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No 90-

In The Supreme Court of the United States

October Term, 1990

CHANCE CORDREY, a minor; and KAREN AND ROBERT CORDREY, on behalf of their minor son,
Petitioners

— *v.*—

R.J. EUCKERT, Superintendent; GREGG SIMON, MARIANN GLECKLER, CAROL KLECK, RICHARD NAPIERALA, and LOREN PENNINGTON, in their capacities as members of the Evergreen Board of Education; EVERGREEN LOCAL SCHOOL DISTRICT; EVERGREEN BOARD OF EDUCATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's evaluation of a handicapped child's need for extended school year services through the use of a strict "regression/recoupment" standard conflicts with this court's decision in *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176 (1982) and Congressional intent under the Education for the Handicapped Act that each handicapped child receive an individualized "free appropriate public education."

2. Whether the Sixth Circuit's application of traditional procedural notions by allocating the burden of proof to the parents and by creating a harmless error exception to a school district's obligation to comply with procedural safeguards of the Education of the Handicapped Act is contrary to this Court's rulings and Congress' remedial intent.

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R.J. EUCKERT, Superintendent; GREGG SIMON, MARIANN GLECKLER, CAROL KLECK, RICHARD NAPIERALA, and LOREN PENNINGTON, in their capacities as members of the Evergreen Board of Education; EVERGREEN LOCAL SCHOOL DISTRICT; EVERGREEN BOARD OF EDUCATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Karen and Robert Cordrey on behalf of their minor child Chance, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 5, 1990.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported at 917 F.2d 1460 (6th Cir. 1990), and is reprinted as

Appendix A. The decision of the United States District Court for the Northern District of Ohio, Western Division, is unreported and is reprinted as Appendix B. The decision of the State Level Review Officer is reprinted as Appendix C. The decision of the Impartial Hearing Officer for the administrative due process hearing is reprinted as Appendix D.

JURISDICTION

This action was brought in the Northern District of Ohio under Title 20 U.S.C. § 1415 (e) (2) to review the administrative decision of the State Level Review Officer, who had reversed the decision of the Impartial Hearing Officer. The District Court rendered its decision on December 12, 1988. Petitioners appealed to the Sixth Circuit, which entered judgment against them on November 5, 1990.

The jurisdiction of this Court to review the judgment of the circuit court is pursuant to Title 20 U.S.C. § 1425 (e) (2) and Title 28 U.S.C. §§ 1254 and 1257.

STATUTES INVOLVED

Title 20 of the United States Code, §§ 1400 *et seq.*

STATEMENT OF THE CASE

1. INTRODUCTION

Karen and Robert Cordrey, on behalf of their minor child Chance Cordrey, seek a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit. Chance Cordrey is a handicapped child as defined under the Education of the Handicapped Act, Title 20 U.S.C. §§ 1400, *et seq.* (EHA). The Cordreys reside in the

Evergreen Local School District (Evergreen). Chance has attended school in a multihandicapped (MH) classroom in the Toledo Public Schools.[5] Since 1982, the Cordreys have been compelled to enroll Chance for summer educational services at the Toledo Autistic Society (TAS), a not-for-profit private agency.

Petitioners maintain that under current federal and state law, Chance is entitled to receive extended school year[6] services (ESY) over the summer; that these services should be placed upon his individualized education program[7] (IEP) and should be provided or paid for by Evergreen.

2. Basis for Federal Jurisdiction

This action was brought in the United States District Court for the Northern District of Ohio (court of first instance) pursuant to the Education of the Handicapped Act (EHA), Title 20 U.S.C. § 1415(e)(2) to ensure the provision of a free appropriate public education[8] (FAPE) to Chance Cordrey and to enforce the procedural protections of the EHA. Evergreen has repeatedly failed and

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5. In February, 1989, Toledo Schools notified Evergreen it was no longer willing to serve Chance. Chance is currently attending an MH class in Fulton County. On April 17, 1990, ESY was added to Chance's IEP.

6. An ESY is an organized program beyond the regular 180 day school year. ESY programs will differ in length and content depending on the unique needs of the child.

7. The IEP is a written document that includes, *inter alia*,: a handicapped child's present level of educational performance; annual goals; short-term instructional objectives; related services, and objective measurable criteria for determining whether goals are being achieved and whether placement is appropriate. Title 20 U.S.C. § 1401(19).

8. A FAPE is one which: (1) meets reasonable state educational standards, and (2) provides specially designed instruction and related services to meet the unique needs of handicapped children, Title 20 U.S.C. 1401 (16-19).

refused to provide Chance Cordrey with an ESY program, in spite of his need for such a program.

3. Statement of Facts

Chance has maladaptive behaviors including autistic behaviors such as self-stimulation, self-abusiveness, non-attending behaviors and social withdrawal (Mark S. Pittner at Tr. 248-50; Karen Cordrey at Tr. 146). Chance's communication skills consist of four manual signs (Karen Cordrey at Tr. 173). Chance needs a teacher working on a one-to-one basis with him because he can work independently for only three-to-five minutes at best. (Judy Jasco at Tr. 415).

Chance's first placement in public education occurred in the 1981-82 school year. An IEP was developed for Chance for the 1981-82 school year, and he was placed in a multihandicapped (MH) class in a Toledo public school. This class did not operate during the summer. In 1982, the Cordreys enrolled Chance in the TAS summer education program. In May 1984, the Cordreys requested that Evergreen provide an ESY program for Chance at the TAS program (Stipulation 6). Without convening a meeting to review Chance's IEP as required by the EHA, Evergreen decided that Chance should receive an ESY at a summer program run by the Fulton County Board of Mental Retardation and Developmental Disabilities. (Stipulation 7).

In November 1985, an IEP meeting was held, but the parties were unable to reach an agreement regarding summer services for Chance. (Stipulation 8). Instead, in May 1986, the parties negotiated an "Agreement and Mutual Release," (Due Process Exhibit 40) including a process to address the ESY issue during the 1986-87 school year. (Stipulation 10). Pursuant to the Agreement, the parties selected Mark S. Pittner, Ph.D., a clinical psychologist, to evaluate Chance. Dr. Pittner completed the evaluation in April 1987. (Due Process Exhibit 46). Dr. Pittner concluded that Chance should be afforded the opportunity to attend an ESY program and that the risks of not providing such a program

were "unacceptable" and "untenable." Dr. Pittner recommended that Chance's regular school year program be followed as closely as possible during the summer. Although the county program and the private TAS program appeared to be similar in what they planned to do, Dr. Pittner concluded that the private program had several proven advantages over the county program, which was in revision.

On May 5, 1987, the parties met to discuss the results of Dr. Pittner's evaluation. The Cordreys understood this meeting to be an IEP meeting in accordance with the Agreement. The District Court held that this meeting was an IEP meeting and the Court of Appeals found no reason to find differently. However, Dr. Pittner and Judy Jasco (Chance's MH teacher) were not invited to the meeting. No representatives from the county program were present. Based on Dr. Pittner's report, the parties agreed that Chance should be enrolled in an ESY program during the summer of 1987. (Stipulation 12). Although no goals or objectives were developed or reviewed, no IEP was available or discussed, and the teacher was not present, Evergreen determined that Chance should be placed in the county program. Furthermore, Evergreen refused to place an ESY program on Chance's IEP unless the Cordreys agreed to exclude the program from the "stay put"[9] provision of the EHA, Title 20 U.S.C. § 1415(e)(3). (Stipulation 14).

Subsequent to the May 5, 1987 meeting, Dr. Pittner clarified that he could not determine the appropriateness or inappropriateness of the county program because at the time of his report the program was in revision. (Due Process Exhibit 47). Therefore, he recommended placement in the private program. Evergreen refused to change its decision.

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9. This section provides that a handicapped child's placement may not be changed while a hearing or suit challenging an IEP is pending.

On May 11, 1987, the Cordreys requested an impartial due process hearing.

4. Proceedings Below

An impartial due process hearing was held on December 7 through 11, 1987. The impartial hearing officer (IHO) found that ESY services are a necessary part of Chance's special education to allow him to benefit from his schooling during the regular academic year and that Evergreen failed to comply with the procedural requirements of the EHA. The IHO ordered that Chance receive ESY services at the Fulton County Board of Mental Retardation, unless the parties agreed Chance's needs could not be met there. The IHO also found that Evergreen had no established criteria for determining whether a handicapped child needs ESY services. Evergreen appealed the IHO's decision and a State Level Review Officer (Referee) reversed the IHO's decision.

On April 27, 1988, the Cordreys appealed the Referee's decision to the United States District Court, Northern District of Ohio, Western Division. The District Court rendered its decision on December 12, 1988. The District Court held that Evergreen did not violate the procedural mandates of the EHA and that the Cordreys failed to prove Chance would suffer significant regression of skills without a summer program.

On January 3, 1989, the Cordreys appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals rendered its decision on November 5, 1990. The Court of Appeals held that the Cordreys waived certain procedural rights under the EHA, and that the District Court did not err as a matter of law or fact in ruling that Evergreen was not obligated to provide Chance with an ESY.

REASONS FOR GRANTING THE WRIT

1. THE SIXTH CIRCUIT'S USE OF A REGRESSION/RECOUPMENT TEST FOR DETERMINING A

HANDICAPPED STUDENT'S ENTITLEMENT TO EXTENDED SCHOOL YEAR SERVICES IS (A) UNSUPPORTED BY THE STATUTE, (B) CONFLICTS WITH THE REASONING OF THIS COURT, AND (C) DEMONSTRATES THE CONFUSION AMONG THE CIRCUITS.

A. The Education of the Handicapped Act

In 1975 there were an estimated 1.75 million children who, although labeled as handicapped, were deprived of any educational services. Another 2.5 million children identified as being handicapped were, in the same year, receiving educational services inappropriate to meet their needs. [1975] U.S. CODE CONG. & AD. NEWS 1425, 1432. These statistics indicate that only slightly over one-half of handicapped children were in fact being provided an adequate education. In order to remedy this situation, Congress enacted The Education For All Handicapped Children Act of 1975.

As amended, the Education of the Handicapped Act (EHA) provides federal financial assistance to states on the condition that those states ensure that all handicapped children within their state have a right to a free, appropriate public education. Title 20 U.S.C. § 1412(1). To further this goal, the EHA sets out a system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their handicapped children and to provide administrative and judicial review of any decisions with which those parents disagree. Section 1401(18) of the EHA defines "free appropriate public education" as:

Special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized educational program required under § 1414(a)(5) of this title.

The EHA further defines "special education" as "specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." Title 20 U.S.C. § 1401(16). "Related services" are those services which "may be required to assist a handicapped child to benefit from special education . . ." Title 20 U.S.C. § 1401(17). These include transportation and developmental, corrective, and supportive services such as speech pathology, audiology, recreation, psychological services, certain medical services, physical therapy, occupational therapy and counseling services. *Id.*

The free, appropriate public education required by the EHA is tailored to the unique needs of the handicapped child by means of an individualized educational program (IEP). Title 20 U.S.C. § 1401(18).[10] The IEP must be reviewed and revised by the local educational agency at least annually. § 1414(a)(5).

B. Extended School Year Services

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10. The IEP is a "written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardians of such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." Title 20 U.S.C § 1401(19).

While many handicapped children are provided with an appropriate education in a traditional nine month school year, others require more than nine months of instruction in order to benefit from their education. This Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) stated that, "furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of a 'free appropriate public education'..." *Id.* at 198-99. The substantive standard espoused was "specialized instruction and related services which are individually designed to provide educational benefit..." *Id.* at 201. Recognizing that a determination of sufficiency of benefit is problematic, this Court emphasized that: "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. Indeed, any attempt to standardize the concept of sufficient benefit risks running afoul of the Act's mandate to individualize goals and objectives to the needs of each child.

The Third, Fifth, Sixth and Eleventh Circuits, as well as district courts in other circuits, have all grappled with the question of a entitlement to extended school year (ESY) services under the Act. The lower court in this case stated that "we have no doubt that ... the issue of whether a child should receive an ESY as part of the IEP will cause continued friction and litigation between parents and schools." *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir 1990). This issue is important not only because of the amount of litigation on the precise point but also, as the Sixth Circuit noted, "the actual dispute ... seems to center on a more fundamental issue: what is the role of an ESY within a 'free appropriate public education' under the Act?" *Id.* at 1472-73. Indeed, petitioners in this case seek clarification of how school districts and parents interpret and apply the Act's fundamental requirement of appropriateness.

The lower court in this case resolved the question by establishing a strict test for students who seek ESY: the parent must

establish that the child's educational skills will regress to such a degree over the summer break that the child will not recoup them in a reasonable time. This strict "regression/recoupment" standard provides the certainty lawyers and courts often seek, at the expense of the Congress' intent that schools provide meaningful benefits based on the individual needs of each handicapped child.

Moreover, the lower court's use of such a rigid standard ignored the reasoning in relevant literature from the special education field. In Browder, Lentz, Knoster and Wilansky's article *Determining Extended School Year Eligibility: From Esoteric to Explicit Criteria*, 13 J. of Assoc'n for Persons with Severe Handicaps (No. 4) 235 (1988), the authors advise that need for ESY should focus not on ill-defined terms such as regression and recoupment, but instead on measuring a student's ongoing progress toward his IEP goals.

The District Court of Hawaii understood the dangers of a single test by which to judge the necessity of ESY for all handicapped children. In *Lee v. Thompson*, 1982-83 Educ. Handicapped L. Rep. (CRR Publishing) 554:429 (D. HI. 1983), the court specifically rejected a strict regression/recoupment standard in favor of a more inclusive test. Five factors were determined to be relevant[11] and, more importantly, the court cited the Act and *Rowley* and concluded that ESY was one additional means of providing instruction, instead of a "backstop" to instruction received during the regular school year. *Id.* at 554:430. Thus the standard to be used was the general *Rowley* standard.

While all of the circuits discuss regression (but not always recoupment), the Act itself does not contain this as a standard for any service. Regression may be a consideration in deciding the

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11. The five factors were: nature and severity of handicap; areas of learning crucial to progress toward self-sufficiency; the extent of regression and the rate of recoupment following an interruption in programming. *Lee, supra*, at 430.

appropriateness of any service; however, as the Sixth Circuit accurately described the concerns of the Cordreys and *amici*, the regression/recoupment standard: "stray(s) too far from its statutory source and (has) take(n) on a life of its own..." *Cordrey, supra* at 1471. The regression/recoupment test establishes a single standard for all handicapped children, in violation of the Act. It is an anomaly against which this Court has cautioned, and which it has the power to correct. Clarification of this point would also clear confusion among the circuits as to what test to apply to a dispute over ESY and how it should be applied.

The first federal ESY cases did not focus on the question of an ESY standard; rather, they were class based challenges to refusals by local officials to provide such services. In *Armstrong v. Kline*, 476 F.Supp. 583 (E.D. Pa. 1979), *aff'd, Battle v. Commonwealth of Penn.*, 629 F.2d 269 (3rd Cir. 1980) parents challenged the state's refusal to provide ESY to all handicapped students. While regression was discussed as a characteristic of the named plaintiffs, *Armstrong* at 593, the court refused to establish specific ESY guidelines because of the children's unique needs. *Id.* at 600. Similarly, *Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983); Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983); and *Yaris v. Special School District of St. Louis County*, 558 F.Supp. 545 (E.D. Mo. 1983) were all cases which challenged statewide policies of denying ESY to all students. While regression is discussed in general terms when describing characteristics of the plaintiff classes, each of these cases identified individualized considerations to enable each child to benefit as the substantive standard. *Crawford*, 708 F.2d 1028, 1035 (5th Cir. 1983); *GARC*, 716 F.2d 1565, 1576 (11th Cir. 1983); *Yaris*, 558 F.Supp. 545, 553 (E.D. Mo. 1983). *See Garrity v. Gallen*, 522 F.Supp. 171, 240 (D.N.H. 1981). (Need for ESY viewed as how many days of service per year are necessary to ensure a proper education for each child).

However, other courts began to run afoul of the *Rowley* standard in deciding an individual child's entitlement to ESY services.

Despite *dicta* acknowledging *Rowley's* "some benefit" standard, some courts have relied solely on a the regression/recoupment test when ruling on an individual student's eligibility. Thus, for example, in *Bales v. Clarke*, 523 F.Supp. 1366 (E.D. Va. 1981), the court ruled that the child must demonstrate extraordinary and irretrievable regression. *Id.* at 1370.

In contrast, the Fifth Circuit has ruled that the proper inquiry is "whether the benefits accrued to the child during the regular school year will be significantly jeopardized." *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986). *See also, Lewisville Independent School District v. Brooke, P.*, 16 Educ. Handicapped L. Rep. (CRR Publishing) 1313 (E.D. Texas 1990).

The basis for confusion among these courts lies in the difficult task of applying *Rowley's* "some benefit" test to a particular service. While it is undisputed that Congress did not intend to provide optimal benefits under the Act, an application of the "some benefit" test to ESY through a strict "regression/recoupment" standard has become an insurmountable barrier to the benefits Congress did have in mind: provision of services which enable children" to *fully* benefit from special education." Sen. R. No. 168, 94th Cong. 1st Sess. at 42. (Emphasis added).

The Act requires school officials to develop and implement an IEP that is designed "to produce [educational] progress, not regression or trivial educational advancement." *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied* 109 S.Ct. 838 (1989), citing, *Board of Education v. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1986). No one instructional objective or related service can be said to be a necessary component in the absence of which a child will derive no educational benefit. The entire IEP must be viewed in the context of providing more than trivial benefit, and by looking to the goal of fostering self-sufficiency. *See, e.g., Armstrong v. Kline*, 476 F.Supp. 583, 599 (E.D. Pa. 1979); *Lee v. Thompson*, 1982-83 EHLR 554:429 (D.HI. 1983), *Polk, supra* at 184-85.

In developing a standard for ESY in this case, the lower court held that the legal question is whether these facts meet the standard of "significant skill losses of such degree and duration so as to seriously impede [Chance's] progress toward his educational goals." *Cordrey, supra* at 1474. The Sixth Circuit found that the testimony regarding whether Chance would regress was directly conflicting but, because Dr. Pittner did not address recoupment, the district court could rely on Chance's prior recoupment patterns. It stated that it would have remanded the case if it interpreted the district court's conclusion that there was "no evidence" of regression to mean that empirical evidence of regression was required. *Id.* at 1475. Instead, the court avoided a remand by assuming that Chance regressed during the school year so any further regression during the summer without programming would be insignificant.

This syllogism, that a child who performs inconsistently during the school year is not entitled to an ESY because he would regress anyway over the summer, demonstrates the underlying flaw in logic of the regression/recoupment standard: it runs afoul of *Rowley* and the EHA. Some children who need an ESY to derive adequate annual benefits will be denied an appropriate education due to their slow, inconsistent learning style.[12] Courts need to recognize that some severely handicapped children may need an ESY to achieve skills on their IEPs whether or not they regress during or between school years. The regression/recoupment standard excludes them from consideration, in violation of the Act.

As shown by this case, the confusion created by the regression/recoupment standard is likely to continue in the courts and in IEP meetings as districts and parents try to apply it. It is a precedent which is at odds with the language of the Act and the

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12. The same logic was used in the Sixth Circuit in *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D. Ohio 1981) *aff'd Rettig v. Kent City School District*, 720 F.2d 463 (6th Cir. 1983).

intent of Congress. Accordingly, consideration and resolution of the issue by this Court is essential.

2. THE SIXTH CIRCUIT'S APPLICATION OF TRADITIONAL DEFENSES AND ALLOCATION OF BURDENS OF PROOF TO PARENTS IN EDUCATION OF THE HANDICAPPED ACT CASES IS UNSUPPORTED BY THE STATUTE AND DECISIONS OF THIS COURT AND IS CONTRARY TO CONGRESSIONAL INTENT.

Over the last year the Sixth Circuit has rendered a series of that threaten the effectiveness of remedial procedures for parents under the EHA. These cases, ignoring the broad remedial intent of Congress, have imposed traditional "legal process" notions of waiver and burden of proof on proceedings under the Act. Congress, on the other hand, clearly intended these proceedings to focus on the child's educational needs.

A. THE SIXTH CIRCUIT'S ALLOCATION OF THE BURDEN OF PROOF TO THE PARENTS: 1) CONFLICTS WITH THE DECISION OF THE HIGHEST STATE COURT IN NEW JERSEY AND 2) IS CONTRARY TO THE REMEDIAL NATURE OF THE ACT AND CONGRESSIONAL INTENT.

The Sixth Circuit ruled in this case that parents bear the burden of proving that the school district has: 1) failed to comply with the procedural safeguards of the Act and, 2) failed to offer an appropriate education to the handicapped child. This ruling is in direct conflict with the ruling of the New Jersey Supreme Court in *Lascari v. Ramapo Indian Hills Regional High School District*, 116 N.J. 30, 560 A.2d 118 (1989). It is also contrary to Congress' intent to protect the rights of handicapped students as evidenced by the elaborate procedural safeguards set forth in the Act. To further the purpose of providing an appropriate education to all

handicapped children, the burden should be placed on the school district as the party which has better access to relevant information and superior expertise. This Court is the final arbiter of matters of federal statutory law decided by state and federal courts and, by granting certiorari in this case, the Court can resolve the conflict in rulings and assure protection of handicapped children's rights as Congress intended.

In enacting the EHA, Congress found that families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense. Title 20 U.S.C. § 1400(b)(2)(6). As this Court recognized in *Honig v. Doe*, 484 U.S. 305 (1988), the educational failings detailed by the Congress reflected more than a lack of financial resources at state and local levels: "Many disabled children were excluded pursuant to state statutes or local rules and policies, typically without any consultation with, or even notice to, their parents." In responding to these problems, Congress enacted the EHA which conferred upon disabled students "an enforceable substantive right to public education in participating states, *see Board of Education v. Rowley*, 458 U.S. 176 (1982), and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." *Honig*, at 310. (Footnote omitted). This Court further stated that:

Envisioning the IEP as the centerpiece of the statute's education delivery system for disabled children, and aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. See §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E) and 1415(b)(2). Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.

Id. at 311-12.

Because of the public school tradition of exclusion from and limitations on services to handicapped children, Congress placed many burdens on public schools, including the responsibility to identify, locate and evaluate every child who is handicapped and in need of special education. Title 34 C.F.R. § 300.220. The Act also requires public schools to obtain professional evaluations of a student's disabilities to ensure that school services are appropriate. Title 34 C.F.R. § 300.530-534. Schools must notify parents of decisions regarding the child's program and the bases for those decisions. Title 34 C.F.R. § 300.504, .505. Parents must be afforded the opportunity to participate in IEP meetings, where the decision making is required to take place. Title 34 C.F.R. § 300.345. If parents refuse to attend the meeting, schools must document their efforts to invite and include the parents. Title 34 C.F.R. § 300.345. Schools are also accountable for establishing appropriate objective criteria and evaluation procedures and schedules for determining whether the child is achieving the short term instructional objectives. Title 34 C.F.R. § 300.346. These regulations recognize that school districts have better access to relevant information and possess expertise the parents lack. Because of the school's superior access to information and expertise, Congress afforded parents an "independent evaluation" of the student's needs at the school's expense if the parents disagree with the district's evaluation and the school fails to prove its evaluation was appropriate. Title 34 C.F.R. § 300.503(b). This statutory and regulatory scheme evidences Congress' intent to place the burden on school districts to demonstrate that they have complied with procedural requirements of the Act and have provided a free appropriate public education to handicapped children.

Across the country courts have struggled with determining which party bears the burden of proving the appropriateness or inappropriateness of the education provided by the district. Courts which correctly place the burden on schools are those which base

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the conclusion on a careful analysis of the EHA's procedural protections.

Thus in *Burger v. Murray*, 612 F.Supp. 545 (N.D. Ga. 1984) the court stated that:

A canvass of the cases dealing with the burden of proof issue reveals that the burden has been imposed either upon the party seeking to change the status quo or upon the school district.

Id., at 437.

The *Burger* court placed the burden on the school district as the party seeking to change the child's placement. It also criticized the decision in *Bales v. Clarke*, 523 F.Supp. 1366 (E.D. Va. 1981) for placing the burden on the parents because *Bales* failed to discuss how placing the burden on parents would further the policies upon which the EHA is premised. *Id.*, at 436.

The split in the decisions arises out of two different approaches to the EHA. One approach views EHA proceedings as traditional adversary proceedings in which the complaining party always bears the burden of proof. This is the approach used by the Sixth Circuit. It relies on the absence of specific statutory language: "nothing in the Act indicates that alleged violations should be treated differently from alleged violations of any other federal statute ..." *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990). The other approach relies on the remedial nature of the Act and concludes that "the adversary nature of the proceedings should yield to obtaining the right result for the handicapped child." *Lascari, supra* at 46, 560 A.2d at 1188. This approach considers the elaborate procedural protections afforded parents and students and concludes that allocation of the burden of proof is consistent with Congress' "abiding concern for the welfare of handicapped children and their parents." *Id.* at 44, 560 A.2d at 1188 *See also, S-1 v. Turlington*, 635 F.2d 342, 348-9 (5th Cir. 1981)(court rejects the school's argument that plaintiff students waived the issue that their expulsions were procedurally improper by failing to raise the issue in a timely manner; "the burden of raising the question (of)

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whether a student's behavior is a manifestation of the student's handicap" is on the school district.

As explained by the New Jersey Supreme Court in *Lascari*, placement of the burden on school districts is consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens. *See United States v. New York, New Haven and Hartford Railroad Company*, 355 U.S. 253, 256 n.5 (1957). With the data and instructional personnel in the control of the district, fairness dictates that the burden of going forward rest on the school district.

Congress has recognized that the bargaining positions of the parties are not equal. Parents, while certainly familiar with their children, do not bring the same professional or evaluative expertise to the IEP process. Moreover, only a school district has authority to include a service on an IEP. The parents' only recourse is to request an administrative hearing. Therefore, the assumption which underlies the proposition that the party attacking the IEP should bear the burden of proof, i.e., that the parties come to the table with equal bargaining power, is fundamentally flawed.

The facts in this case demonstrate the unequal bargaining power of parents and the school. For example, although the parties agreed Chance should receive an ESY in 1987, Evergreen unilaterally refused to place the service on the IEP unless the Cordreys waived their right under the Act to have the current IEP stay in force during any future dispute. Similarly, the parties had agreed to follow the recommendations of an mutually agreed upon independent expert, only to have the school district, again unilaterally, decide not to follow the recommendations. The Cordreys, after years of negotiations and unilateral decisions by the school district, pursued their only remedy by filing for due process, only to have the Sixth Circuit rule that they had acted prematurely.

Because of the unequal positions of the parties, the implication for handicapped students of placing the burden of proof on parents

is widespread ineffectiveness of private actions as a vital means for enforcing the appropriateness of services offered to students by school districts. Districts may withhold information or fail to collect data which would support a parent's claim for services. Teaching personnel employed by the district may be discouraged by the district from expressing their professional opinions about students' needs.

Other courts have recognized that the importance of discerning the truth about a handicapped child's needs far outweighs any interests in imposing a traditional adversarial system on the due process hearing and subsequent court review. Petitioners urge this Court to resolve the conflict between the Sixth Circuit and other courts and to enforce the remedial purpose of the Act by requiring school districts to fully justify educational decisions and prove both compliance with procedural safeguards and the appropriateness of programs offered.

B. THE SIXTH CIRCUIT'S "HARMLESS ERROR" EXCEPTION TO THE PROCEDURAL SAFEGUARDS MANDATE OF THE EDUCATION OF THE HANDICAPPED ACT IS (A) UNSUPPORTED BY THE STATUTE AND DECISIONS OF THIS COURT, AND (B) CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982) this Court stated that the importance Congress attached to the elaborate and highly specific procedural safeguards embodied in Title 20 U.S.C. § 1415 cannot be gainsaid and "that Congress placed every bit as much emphasis upon compliance with procedures ... as it did upon the measurement of the resulting IEP against a substantive standard." *Id.* at 205-6. This Court concluded that "compliance with procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206.

Without congressional authorization, the Sixth Circuit has manufactured a harmless error exception to the procedural safeguards school districts must afford parents and students under the Education of the Handicapped Act (the Act), Title 20 U.S.C. §§ 1400, *et seq*. In this and at least two other recent cases, the Sixth Circuit has found school districts violated the Act's important safeguards, yet concluded that these violations were irrelevant, insubstantial or nonprejudicial. Even though the students' individualized education programs (IEPs) were not properly developed,[13] the Sixth Circuit continued to give "utmost deference" to the school districts' educational decisions. See *Doe v. Defendant I*, 898 F.2d 1186, 1188-89 (6th Cir., 1990). This represents a clear departure from this Court's holding in *Board of Education v. Rowley*, 458 U.S. 176 (1982). Moreover, the Sixth Circuit's opinion in this case conflicts with decisions in the Fourth Circuit: *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 259 (4th Cir. 1988) *cert. denied* 109 S.Ct. 1131 (1989) and *Hall v. Vance Cty. Bd. of Education*, 774 F.2d 629, 635 (4th Cir. 1985). While the Sixth Circuit has chosen to minimize these procedural violations, this Court implicitly and the Fourth Circuit explicitly recognize that such violations constitute denial of a free appropriate public education to the student.

Accordingly, Petitioners invoke this Court's power of supervision over lower federal courts because of the importance to parents and handicapped students of requiring school districts to

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13. In *Thomas v. Board of Education*, 918 F. 2d 618 (6th Cir. 1990), a proper IEP was developed but never implemented. The Court held that the district was not bound by the "stay put" provision of the Act to implement this IEP.

follow proper procedures for designing education programs. The lower Court's erroneous rulings threaten the effectiveness of administrative and court review as a means of ensuring the appropriateness of a student's education.[14]

This Court addressed the importance of procedural requirements in two other cases which are instructive here: one in which the school district argued for a dangerousness exception to "stay-put" and the other in which the school district argued that the parents violated the provision by removing the child from public school and placing him in a private school. In *Honig v. Doe*, 484 U.S. 305 (1988) this Court refused to manufacture an exception to the stay-put mandate and exclude a student from attending school even when the student's behavior was dangerous. In *Burlington School Comm'n v. Massachusetts Department of Education*, 471 U.S. 359 (1985), this Court held that the stay-put mandate applied to school districts but not parents. The reasoning the Court applied in both cases was that Congress did not intend to place parents in the untenable position of choosing between a free but inappropriate education offered by the district and an appropriate education at the parents' expense.

The District Court in this case concluded that the May 5, 1987 meeting was an IEP meeting. The Court of Appeals accepts this finding of fact as well as the legal conclusion that Evergreen plainly violated Title 20 U.S.C. § 1402(19), Title 34 C.F.R. § 300.344(a)(2) and OAC 3301-51-02(E)(1)(a)(ii) by not requiring Chance's teacher to be present. The Circuit Court acknowledges that for the three preceding years, the Cordreys repeatedly requested extended school year (ESY) services from Evergreen but

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14. *See Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136 (1968). Review granted because erroneous rulings of the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States.

the district denied these services without ever convening a proper IEP conference. Despite *dicta* that "a school district should not be allowed to frustrate the parents' rights under the Act by a policy of repeated violations followed by contrite offers to repent and sin no more," *Cordrey, supra* at 1466, the Circuit Court's ruling permits precisely this result. Because Evergreen offered to hold another meeting, the Court excused it from compliance mandates.

The Circuit Court's newly created exception to compliance mandates is premised upon a waiver theory. Although the impartial hearing officer found no waiver of procedural safeguards by the parents, the district court[15] found one.

The issue of waiver under the Act appears to be one of first impression. Indeed, the Sixth Circuit stated: "there do not seem to be any prior administrative or judicial decisions which address the specific waiver here." *Id.* at 1465. Whether or not this Court accepts the lower courts' findings that the Cordreys were unreasonable in filing for a due process hearing six days after the meeting and that the district did not make a placement decision at the meeting, the district retains the responsibility to properly evaluate and design a program based upon that evaluation to meet a student's needs. In essence, parents may be able to waive their right to attend the IEP meeting but they can not waive their child's right to an appropriate education by not attending a meeting. This is clearly what Congress and the Ohio Legislature intended when they set forth statutory and regulatory schemes which require districts to document attempts to arrange mutually agreeable meet-

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15. The Court of Appeals refers to the district court as the trial court; however, the IHO hears the testimony and the SLRO and district court conduct a *de novo* review.

ing times and to conduct the IEP meeting if the district can not convince parents to attend. Title 34 C.F.R. § 300.345(d), Title 20 U.S.C. § 1414(a)(5), Title 34 C.F.R. § 300.343(d), OAC §§ 3301-51-02 (E)(2)(b) and (3).

Evergreen failed to document the parents' refusal to attend and more importantly, failed to hold another IEP meeting for six months until immediately prior to the due process hearing.[16] The Sixth Circuit appears to agree that the district's obligation to hold a proper IEP meeting continues after parents refuse to meet: "If in fact Evergreen failed to conduct a proper IEP meeting for Chance in 1987, its failure to follow the procedures of the Act would seem sufficiently substantial to support a charge that Evergreen denied Chance a 'free appropriate public education' under the Act." *Id.* at 1468. The Court "carefully considered whether this circumstance warranted a remand," but concluded that because another meeting was held within the year the Cordreys could not object. *Id.*

The implication of the Circuit Court's ruling is that so long as another meeting is held within the annual requirements of the Act, even if it is motivated by pending litigation, and the record reflects no evidence of what occurred, prior procedural violations are of no effect. Yet, it is unlikely that litigation under the Act will be resolved within a year; therefore, application of the Sixth Circuit's ruling will make it virtually impossible for parents to seek judicial correction of past procedural safeguard violations. Moreover, by permitting the school district to wait until November to meet, the court allows the district to make a *de facto* decision not to provide an ESY and thus an appropriate public education. Congress did

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16. This IEP meeting was characterized as settlement negotiation and admission of evidence regarding it was objected to by the district's counsel. In fairness, the Court of Appeals should not have assumed that Evergreen acted properly since no evidence was allowed at the due process hearing.

not intend districts to make unilateral educational decisions by nonfeasance.

But the Sixth Circuit's permissive standard toward school district's procedural violations in this case including: (1) failures to include at the IEP meeting the child's teacher, the evaluator, people knowledgeable about the program options; (2) conditioning provision of services upon a waiver of the "stay-put" provision; (3) repeated failures to make the ESY decision at an IEP meeting; (4) failure to properly develop a program even if the parents refuse to meet; and (5) failures to document parents' refusals to meet and reasons in support of the district's educational decisions, presents just one of several recent examples of how the Sixth Circuit is eroding the procedural safeguards afforded to parents and students under the Act.

For example, in *Thomas v. Cincinnati Board of Education*, 918 F.2d 618 (6th Cir. 1990), the Sixth Circuit concluded that the stay-put mandate was not violated when a proper IEP was developed but never implemented by the district. Moreover, the district conceded that it failed to comply with the written notice requirements of Title 20 U.S.C. § 1415(b)(1)(C), yet the Court concluded that the parent's cause was not "prejudiced" by these violations.

Procedural violations in the development of an IEP were found in *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990), yet again the Court labeled these requirements as mere technicalities which can be overlooked. In *Doe*, the school district violated Title 20 U.S.C. §§ 1401(19)(A) and (E) by failing to include in the IEP the child's present levels of performance and objective criteria and evaluation procedures and schedules for determining whether objectives are being achieved.

While acknowledging Congress' intent to afford parents full participation in all stages of the process, *e.g. Doe* at 1190, *Thomas*, *Doe* and *Cordrey* severely undercut parents' ability to do so. The Court's rulings seem to say that if parents attend a meeting, the

district has met its obligations under the Act. The effect of these three cases is that parents do not have access to critical pieces and sources of information which the school district is required by law to collect, consider and make available. The effectiveness of parental involvement is undercut.

Moreover, these rulings are directly in conflict with the rulings of other circuits. Two cases from the Fourth Circuit recognize the importance of these procedural requirements. Under facts similar to those in this case, the Fourth Circuit held that a school district's placement decision made without reference to an IEP constitutes a denial of a free appropriate public education. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 259 (4th Cir. 1988) *cert. denied*, 109 S.Ct. 1131 (1989). Under facts similar to those in *Thomas*, the Fourth Circuit held that a school district's repeated failures to inform parents of their procedural rights constitute denial of an appropriate education. *Hali v. Vance Cty. Bd. of Education*, 774 F.2d 629, 635 (4th Cir. 1985).

Confusion among circuits should be cleared. This Court's guidance as to the importance of complying with procedural safeguards to assure proper development of a student's program will affect handicapped children nationally. These procedural rights are not mere technicalities but instead, as Congress intended, assure full parental participation and school district accountability for developing appropriate programs.

This case also provides this Court with a clear opportunity to enforce its holding in *Rowley* that procedural safeguards provided by the Act are of equal importance with the substantive provisions. School districts need to receive a clear signal from this Court that repeated and multiple violations of procedural rights will not be tolerated.

Conclusion

In passing the EHA, and through its numerous reauthorizations, Congress has voiced strong support for the concept of special education services for handicapped children that are based on each

child's individual needs. The Sixth Circuit's decision in this case instead applies a rigid standard that will prevent many children, including Chance, from receiving those necessary services. Similarly, the Sixth Circuit has chosen in a series of recent cases to ignore Congress' mandate that school districts carefully follow the procedural requirements of the Act. This Court, in taking and deciding this case, will assist parents by enforcing these Congressional mandates.

Accordingly, petitioners ask that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals
(Decided and Filed November 5, 1990)

No. 89-3035
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHANCE CORDREY, *a minor*;
KAREN CORDREY and ROBERT CORDREY,
on behalf of their minor son,
Plaintiffs-Appellants,

— v.—

R. J. EUCKERT, *Supt.*;
GREGG SIMON, *Board Member*;
MARIANN GLECKLER, *Board Member*;
LOREN PENNINGTON, *Board Member*;
EVERGREEN LOCAL SCHOOL DISTRICT;
EVERGREEN BOARD OF EDUCATION,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Northern District of Ohio

Before: BOGGS and NORRIS, *Circuit Judges; and*
ENGEL, *Senior Circuit Judge.*

Plaintiff Chance Cordrey, a minor, is a handicapped child within the meaning of The Education For All Handicapped

Children Act ("the Act"), 20 U.S.C.A. § 1400 *et seq.* (1989). With his parents he appeals a judgment entered in the district court in favor of the defendants, the Evergreen Local School District, the Evergreen School Board and several School Board officials (collectively, "Evergreen"). The Cordreys claimed that by failing to provide Chance with an extended school year (ESY) program,[1] Evergreen has denied him a "free appropriate public education" in violation of the Act. The appeal presents several issues, including whether and under what circumstances parents may be deemed to have waived a procedural right under the Act, and the proper standard by which a court should review a denial of an ESY to a handicapped child. We ultimately hold that the parents here did waive certain procedural rights under the Act, and that the district court did not err as a matter of law or fact in ruling that Evergreen was not obligated to provide Chance with an ESY.

I.

Chance, now fifteen years old, is handicapped by severe developmental delays following an autistic pattern. His maladaptive autistic behaviors include self-stimulation, self-abusiveness, non-attending behaviors, and social withdrawal. His communication skills consist of four manual signs, and he can work independently for only three to five minutes at best. An individualized educational program (IEP), required under the Act, was formulated for Chance for the 1981-82 school year, and he was placed in a multihandicapped class in a Toledo public school. This class did not operate during the summer. In 1982, the Cordreys enrolled Chance in a summer education program operated by the Toledo Autistic Society (TAS), a non-profit private agency. In May 1984, after two summers of the private program, the Cordreys requested Evergreen to pay for Chance's program as part of his IEP. Without convening a meeting to review Chance's IEP as provided by the Act, the Evergreen Board of Education decided that Chance should

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1. An ESY is an organized program beyond the regular 180 day school year.

receive an ESY at a summer program run by the Fulton County Board of Mental Retardation and Developmental Disabilities.

In November 1985, an IEP meeting was held, but the Cordreys and Evergreen were unable to reach an agreement regarding summer services for Chance. Instead, in May 1986, the parties negotiated a process to address the ESY issue during the 1986-87 school year. Pursuant to the agreement, the parties selected Dr. Mark Pittner, a clinical psychologist, to evaluate Chance. Dr. Pittner completed the evaluation in April 1987. He concluded that Chance would benefit from an ESY program, and faced an "unacceptable" and "untenable" risk of regression without one. Dr. Pittner also stated, however, that it was impossible to assess empirically or psychometrically whether an ESY program was *necessary* for Chance since he had been enrolled in a summer program for the previous several years.

On May 5, 1987, the Cordreys met with the Superintendent of Evergreen schools, a Fulton County Board psychologist, a psychology intern and counsel for the parties. Neither Dr. Pittner nor Chance's teacher, Judy Jasco, attended. Based on Dr. Pittner's evaluation, the parties agreed that Chance should be enrolled in an ESY program in the coming summer. While Evergreen suggested that Chance should be placed in the county program, the Cordreys strongly favored the TAS program. Furthermore, Evergreen refused to place an ESY program on Chance's IEP unless the Cordreys agreed to exclude the program from the "stay put" provision of the Act, 20 U.S.C. § 1415(e)(3). This section provides that a handicapped child's placement may not be changed while a hearing or suit challenging an IEP is pending. Rejecting this condition, the Cordreys countered that the IEP meeting was improperly constituted under the Act because Chance's teacher was absent. Evergreen responded that the meeting was not an IEP meeting but only a preliminary discussion of Dr. Pittner's report, and offered to hold a formal IEP meeting at a later date with Chance's teacher in attendance. The Cordreys refused the offer. The meeting then ended without agreement between the parties.

Several days later, on May 11, the Cordreys requested an impartial due process hearing pursuant to the Act to challenge the lack of an ESY in Chance's IEP. Following a hearing in December 1987, the impartial hearing officer concluded that Chance should receive ESY services, and that these could be provided through the county program. On appeal the state-level reviewing officer reversed, concluding that the Cordreys had failed to demonstrate that Chance needed an ESY. The Cordreys then began the present suit in federal district court, where they further alleged that Evergreen had discriminated against Chance on the basis of his handicap. On December 8, 1988, the district court held that Evergreen had not violated the procedural mandates of the Act and that the Cordreys had failed to prove that Chance would suffer significant regression of skills without a summer program. The court did not directly address the discrimination claim.

On appeal, the Cordreys argue that Evergreen violated the procedural requirements of the Act as well as its "stay-put" provision. They also contend that Evergreen's failure to provide an ESY to Chance denied him a "free appropriate public education" under the Act, and that the district court further erred in placing the burden of proof on this issue on the Cordreys. Last, they renew their discrimination claim.

II.

The Act requires any state that receives funding thereunder to provide all handicapped children with a "free appropriate public education," 20 U.S.C. § 1412(1), "regardless of the severity of their handicap." § 1412(2)(c). A "free appropriate public education" is one which is designed to meet the unique needs of the child, by means of an "individualized education program" (IEP). §§ 1401(16), (18). The Act and corresponding federal and state regulations detail the procedures by which an IEP is to be developed and revised by the parents, the school district and the teacher. §§ 1401(19), 1415; 34 C.F.R. § 300.340-349; Ohio

Admin. Code. § 3301-51-02. If dissatisfied with any matter relating to the child's evaluation or educational placement, the parents may seek an impartial due process hearing to resolve the matter, with appeal to the state educational agency. §§ 1415(b)(2), 1415(c). Thereafter, "[a]ny party aggrieved by the findings and decision" of the state administrative hearing may bring a civil action in a federal district court. § 1415(e)(2).

In *Hendrick Hudson Bd. of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court observed that neither the Act nor its legislative history establishes a substantive standard defining what level of education amounts to a "free appropriate public education." 458 U.S. at 189. The Court did conclude, however, that "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content of an IEP." 458 U.S. at 206. "[A] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" 458 U.S. at 206. *Rowley* thus "requir[es] adherence to the procedural demands of the Act, while giving utmost deference to specific educational decisions once it is determined that they stem from the procedures outlined in the Act." *Doe v. Defendant I*, 898 F.2d 1186, 1188-89 (6th Cir. 1990).

III.

We now consider various procedural issues under the first prong of the *Rowley* inquiry.

A. Whether the Cordreys waived their right to a properly constituted IEP meeting.

1. Standard of review

The Cordreys do not contest any of the trial court's factual findings relating to this issue. Although neither party discussed the proper standard of review on appeal, we conclude that the issue of waiver is a question of law or at least of mixed law and fact, subject to *de novo* review. *See Taylor & Gaskin, Inc. v. Chris-Craft Industries*, 732 F.2d 1273, 1277 (6th Cir. 1984).

2. Waiver

A waiver normally occurs by "an intentional relinquishment of a known right." *See, e.g., Palfy v. Cardwell*, 448 F.2d 328, 332 (6th Cir. 1971). The waiver must be knowing, intelligent, and voluntary. *Leaman v. Ohio Dep't. of Mental Retardation*, 825 F.2d 946, 956 (6th Cir. 1987) (en banc). The burden of proof is upon the party claiming the waiver. *Masden v. Travelers Ins. Co.*, 52 F.2d 75, 76 (8th Cir. 1931); *see Palfy*, 448 F.2d at 332.

The trial court found that the May 5, 1987 meeting was an IEP meeting. Because Chance's teacher did not attend, the meeting plainly violated the procedural requirements of the Act. 20 U.S.C. § 1402(19); *see also* 34 C.F.R. § 300.344(a)(2) and O.A.C. § 3301-51-02(E)(l)(a)(ii).[2]

The court also found that Evergreen did not make any placement decisions at the meeting. Rather, Evergreen merely "suggested" formally placing Chance in the County ESY program as part of his IEP, on the condition that the Cordreys waive the "stay-put" provision of the Act. The district court held that the Cordreys waived their right to a properly constituted IEP meeting when, with benefit of counsel, they unreasonably rejected Evergreen's offer to schedule one. The court reasoned that they had not shown that a further meeting would have been futile because there was no evidence that Evergreen would have continued to refuse to subject an ESY to the "stay-put" provision, if

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2. On appeal, Evergreen continues to maintain that the meeting was *not* an IEP meeting. We accept the trial court's finding to the contrary as not clearly erroneous.

they were later to produce evidence that Chance would suffer significant regression without an ESY. In support of the waiver holding, the trial court cited various cases on waiver of constitutional statutory rights, including *Palfy* and *Leaman, supra*. None of these cases arose under the Act, and there do not seem to be any prior administrative or judicial decisions which address the specific waiver here.

The Cordreys contend that their refusal of Evergreen's offer was not a waiver because a further meeting would have been pointless. They emphasize, as the parties stipulated in the informal due process hearing below, that Evergreen had agreed at the May 5 meeting that based on Dr. Pittner's opinion, Chance should be enrolled in an ESY program in the coming summer and that Evergreen had decided that the county program was proper. The Cordreys also express their frustration and sense of futility at Evergreen's failure to convene a proper IEP meeting, when they had been seeking ESY services for their son for three years and had specifically agreed with Evergreen to hold an IEP meeting to discuss Dr. Pittner's evaluation. In their view, to sanction them for walking out and seeking an ESY through the administrative and judicial review process under the Act would effectively give the school district complete control over their right to this review.

Whether the district court rightly concluded that the Cordreys waived their right to a proper IEP meeting seems to hang on the court's finding that Evergreen did not make a placement decision at the May 5 meeting but rather conditionally offered to include an ESY in Chance's IEP. This finding, supported by the undisputed fact that Chance's IEP has never included an ESY placement, is not clearly erroneous. Thus, the issue of Chance's ESY placement was still open after the meeting.[3] *See also § IV-B infra*, rejecting

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3. *See also § IV-B infra*, rejecting the Cordreys' claim that Evergreen had agreed to provid an ESY in the parties' 1986 Agreement and Mutual Release.

the Cordreys' claim that Evergreen had agreed to provide an ESY in the parties' 1986 Agreement and Mutual Release.

As noted above, *Rowley* makes clear that compliance with the Act's procedures for developing an IEP is of central importance in determining its substantive propriety. A school district must heed these requirements, particularly those "giving parents and guardians a large measure of participation at every stage in the administrative process," including the formulation of an IEP. 458 U.S. at 205. We emphasize today that the parents likewise are obligated to operate within the Act's procedural framework. Although we have some sympathy for the frustration of Chance's parents, we are unwilling to hold that the school district's initial failure to comply with its procedural obligations, followed promptly by an offer to remedy its default, was sufficient to entitle the Cordreys to abort the IEP process. In effect, they seek to employ Evergreen's technical violation to transform the administrative review process into an alternative route to obtain an ESY for Chance. We agree that a school district should not be allowed to frustrate the parents' rights under the Act by a policy of repeated procedural violations followed by contrite offers to repent and sin no more. That, however, is not the case here. The Cordreys do not contest the trial court's finding that they acted knowingly and voluntarily in refusing the offer, especially since they were accompanied by counsel at the May 5 meeting. We thus agree with the trial court that they voluntarily relinquished their right to a procedurally correct IEP meeting in the hope that they might win an ESY for Chance through the review process. *Cf. Leaman*, 825 F.2d at 956 (noting that waiver was knowing, voluntary, and with benefit of counsel).

B. Other alleged procedural violations of the Act by Evergreen

1. Standard of review

Whether a school district has complied with the procedural requirements of the Act is a question subject to review *de novo*.

Doe v. Defendant I, 898 F.2d at 1190. Findings of fact by the district court are accepted on appeal unless clearly erroneous. *See Taylor & Gaskin*, 732 F.2d at 1277. We consider the remaining allegations of procedural violations employing these standards.

2. Burden of proof

The Cordreys and amicus Advocacy, Inc., a public advocacy group for the developmentally disabled, urge that the burden of proof of procedural compliance is properly on the school district. Advocacy emphasizes that the Act affirmatively obliges the states to comply with its comprehensive procedures. *See, e.g.*, 20 U.S.C. § 1415(b)(1)(C) (requiring states to give written notice to parents regarding placement decisions); 34 C.F.R. § 300.345 (requiring states to take certain steps to ensure that parents are afforded the opportunity to participate in the development of their child's IEP). The logic of such a position seems to be that the state must earn the deference which *Rowley* accords to it when the court reviews the substantive content of the IEP. Thus, in *Doe v. Defendant I* our court held that "*Rowley* teaches that courts must subject IEP's to a strict review when determining whether they are procedurally deficient." 898 F.2d at 1190. On the other hand, nothing in the Act indicates that alleged violations should be treated differently from alleged violations of any other federal statute imposing affirmative obligations on the states and their subsidiaries. Absent more definitive authorization or compelling justification, we decline to go beyond strict review to reverse the traditional burden of proof.

3. The alleged violations

Without specifically addressing the issue of burden of proof, the district court held that Evergreen had not violated any other procedural provisions of the Act or of Ohio law. On appeal to this court, the Cordreys raise several alleged procedural violations by Evergreen in addition to the improperly constituted IEP meeting.

a. Did Evergreen make a placement decision inconsistent with Chance's IEP and without input from the IEP team?

The Cordreys argue that Evergreen violated the Act and related regulations by deciding at the May 5 meeting to place Chance in the county ESY program without referring to his IEP or assessing whether the program was suitable and without input by his teacher, parents, or persons knowledgeable about the adequacy of the county program. Having already upheld the trial court's finding that Evergreen did not make a placement decision for Chance at the meeting, we find no procedural violation here.

b. Did Evergreen fail to document the parents' refusal to attend a reconvened IEP meeting?

A school district must ensure that the parents of a handicapped child have full opportunity to participate in the IEP meeting. Should the parents refuse to attend, the district must maintain records of its attempts to arrange a mutually agreeable meeting. 34 C.F.R. § 300.345(d). The corresponding Ohio regulation provides that a waiver signed by the parents may substitute for such records. O.A.C. § 3301-51-02(E)(2)(b). The Cordreys allege that Evergreen offered none of the required documentation to prove its claim that they waived their right to a proper IEP meeting. As Evergreen persuasively responds, however, this omission is insubstantial since the Cordreys explicitly rejected Evergreen's offer to reconvene an IEP meeting and initiated a due process hearing only six days later. The Cordreys do not suggest that they might have been receptive to a renewed offer for a reconvened meeting; indeed, Mrs. Cordrey testified in deposition in this litigation that she thought another IEP meeting would have been futile. Evergreen's failure to document refusal was thus inconsequential. See *Doe v. Defendant I*, 898 F.2d at 1190-91 (declining to "exalt form over substance" by holding that technical deviations from the Act's procedural requirements render an IEP invalid); *Burke Cty. Bd. of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (minor procedural faults of school board were insignificant since they did not cause the child to lose educational opportunity); *compare with Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 259 (4th Cir. 1988) (school district's placement decision

made without reference to an IEP or parental involvement constitutes denial of a free appropriate public education to the child), *cert. denied*, 109 S.Ct. 1131 (1989); *Hall v. Vance Cty. Bd. of Education*, 774 F.2d 629, 635 (4th Cir. 1985) (school district's repeated failures to inform parents of their procedural rights constitutes denial of a free appropriate public education to the child).

c. Did Evergreen fail to conduct an IEP meeting without the Cordreys?

The Act provides that a meeting to review and possibly to revise a child's IEP must be held at least once a year. 20 U.S.C. § 1414(a)(5); *see* 34 C.F.R. § 300.343(d); O.A.C. § 3301-51-02(E)(12). The relevant regulations also state that an IEP meeting "may be conducted without a parent in attendance if the [school district] is unable to convince the parents that they should attend." 34 C.F.R. § 300.345(d); O.A.C. § 3301-51-02(E)(3).

The Cordreys argue on appeal that regardless of whether Mr. and Mrs. Cordrey waived their right to participate, Evergreen was still obliged to consider Chance's needs at a properly convened IEP meeting following the improper May 5 meeting. They apparently allege that Evergreen failed to do so. Evergreen responds that having refused to cooperate, the Cordreys are not in a position to object that it failed to conduct a proper IEP meeting. Since under the cited regulations an annual meeting to review the child's IEP is mandatory while parental attendance is not, Evergreen's position is not, in our view, well taken. *See Spielberg*, 853 F.2d at 259.

If in fact Evergreen failed to conduct a proper IEP meeting for Chance in 1987, its failure to follow the procedures of the Act would seem sufficiently substantial to support a charge that Evergreen denied Chance a "free appropriate public education" under the Act. *See Doe, Spielberg*, and *Hall, supra*. However, the record clearly indicates that an IEP meeting was in fact held in November 1987, one year after the previous IEP meeting. *See* Jt. App. at A62-63 (Chance's IEP, dated November 1987); Jt. App.

at A55 (Chance's IEP, dated November 1986). *See also* Jt. App. at A56-59 (teacher Jasco's review of Chance's IEP and progress, dated May 30, 1987); Appellant's Reply Brief at 9 n.1 ("Since May 5, 1987, the Cordreys have met with Evergreen officials at least six times to discuss Chance's IEP."))(sic). We recognize that no minutes of any meetings to evidence Evergreen's specific conduct were in the record, as pointed out by the Cordreys at oral argument. It is also true that the district court did not address this issue, probably in the belief that its findings concerning waiver mooted the issue, and we have carefully considered whether this circumstance warrants a remand. However, from the undisputed evidence available it is so apparent that an annual meeting was held in substantial compliance with the state and federal regulations that the Cordreys' objections to the contrary are untenable.

d. Did Evergreen violate the "stay-put" provision of the Act?

Under the "stay-put" provision of the Act, a child shall remain in his current educational placement pending an impartial due process hearing or subsequent appeals, "unless the State or local educational agency and the parents ... otherwise agree." 20 U.S.C. § 1415(e)(3); *see also* 34 C.F.R. § 300.513 and O.A.C. § 3301-51-02(b). The stay-put provision applies only to services included in the child's IEP. *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).

It is undisputed that Chance's IEP has never formally included an ESY placement. Accordingly, the district court concluded that Evergreen had not violated the stay-put provision by refusing to maintain Chance in the private TAS program where his parents had placed him. Since Evergreen never formally decided to include an ESY placement in Chance's IEP, *see supra* § III-A-2, then this ruling must stand.

The Cordreys further argue that Evergreen violated the stay-put provision by refusing at the May 5, 1987 meeting to include an ESY on Chance's IEP unless his parents agreed to exempt the

placement from the provision. In their view, Congress could not have intended that the school district have such unilateral control of the IEP, nor have expected that the school district would go to such lengths to avoid its alleged obligations under the Act. No legislative history or other authority is cited in support of this claim. For its part, Evergreen suggests that the "otherwise agree" clause specifically permits conditional placements.

We decline to adopt the interpretation advanced by either of the parties. The stay-put provision does not seem to be one of the Act's procedural requirements, like those discussed earlier, that attempts to ensure an adequate IEP and whose violation would constitute a denial of a free appropriate public education. Rather, the stay-put provision is activated only when a party has alleged such a violation and initiated administrative and judicial review. Analytically, we believe that Chance's objection to Evergreen's conditional offer of an ESY raises not a procedural but a substantive issue: was Chance entitled to but wrongfully denied an ESY as a part of his IEP? This issue will now be discussed.

IV.

A. Standard of review

The *de novo* standard of review established in *Doe v. Defendant I* applies to the substantive as well as procedural inquiries into whether an IEP constitutes a "free appropriate public education." *See* 898 F.2d at 1190; *see also Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514, 516 (6th Cir. 1984) (stating that whether a given educational program is appropriate is a mixed question of fact and law, ordinarily freely reviewable on appeal). The Supreme Court in *Rowley* rejected the position that the Act gives courts broad power in the substantive inquiry to upset placement decisions by school officials:

...[T]he provision that a reviewing court base its decision on the "preponderance of the evidence" [, 20 U.S.C. § 1415(e)(2),] is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school

authorities which they review.... The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

458 U.S. at 206. Interpreting this and related passages in *Rowley*, our circuit has held that a district court should exercise *de novo* review over the school district's placement decision, but should accord it "due weight" and "greater deference ... if the procedural requirements of the Act are met. In this way, the court's encroachment on the basically legislative decisions involving the distribution of educational resources is kept to a minimum." *Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir. 1983).

B. Burden of proof

This circuit has recently joined the Fifth Circuit in holding that the party challenging the terms of an IEP should bear the burden of proving that the educational placement established by the IEP is not appropriate. *Doe v. Defendant I*, 898 F.2d at 1191 (citing *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part, on other grounds, sub nom. Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984)). Under this rule, Chance and his parents would bear the burden of proof since they seek to add ESY services to his IEP.

The Cordreys raise several objections to this conclusion, but none is persuasive. First, they contend that it is Evergreen that seeks to change Chance's placement because an ESY had been functionally if not formally a part of his IEP by virtue of the Agreement and Mutual Release signed by the parties in June 1986. The Agreement provided that an ESY program was "necessary" for Chance in 1985 and 1986, and that Evergreen would pay for part of these programs and transport Chance to them. As Evergreen points out, however, other provisions of the Agreement plainly undercut the Cordreys' argument. Paragraph 5 of the Agreement provides that Evergreen made these concessions only to avoid litigation and not to admit any legal obligation, and that

Chance should be evaluated to determine if and to what degree he needed an ESY in 1987. Evergreen also explains convincingly that it agreed that an ESY in 1985 and 1986 was "necessary" only to secure funding for the agreed payments.

Second, the Cordreys argue that they do not now seek for the first time to change the IEP, but rather that they have never agreed to the lack of an ESY in the IEP. This claim is belied by the fact that the Cordreys first requested Evergreen to pay for Chance's summer programs in 1984, three years after they and Evergreen first developed Chance's IEP.

In the alternative, the Cordreys urge that Evergreen should bear the burden of proof because it failed to meet a procedural requirement of the Act in not documenting the parents' refusal to attend an IEP meeting.[4] Even though not significant enough to render the IEP invalid automatically, they argue this infraction should at least raise a presumption that the IEP is substantively invalid. While this argument would have some appeal in a proper case, it fails here, where we have found no relevant violation of the procedures which might have any bearing upon the resolution of the specific complaint.

Chance and amici also propose an alternative standard under which the school district would *always* bear the burden of proof. This position has since been undercut in this circuit by *Doe v. Defendant I*.

C. The standard for whether an ESY is necessary to a "free appropriate public education"

As we have noted earlier, *see supra* p.5, the key substantive term of "free appropriate public education" in the Act is defined in "general and somewhat imprecise" terms. *Rowley*, 458 U.S. at 205. After a thorough analysis of the Act and its legislative

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4. *See* § III-B-3-b, *supra*.

history, the Court set forth the statutory definition by holding that a "free appropriate public education" "consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201.[5] However, the Court explicitly declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202. Instead, the opinion in *Rowley* limited its substantive review to the facts of that case, which concerned the educational needs of a deaf child performing above average in a regular classroom. *Id.* The facts here are considerably more challenging.

In the context of the severely handicapped, a district court in this circuit has held that a child is entitled to an extended school year if it would be not merely "beneficial but ... a necessary component of an appropriate education for [the child]." *Rettig v. Kent City School Dist.*, 539 F.Supp. 768, 778 (N.D. Ohio 1981), *aff'd in part, vacated in part on other grounds*, 720 F.2d 463 (6th Cir. 1983). More specifically, an ESY "would be appropriate if it would prevent significant regression of skills or knowledge retained by [the child] so as to seriously affect his progress toward self-sufficiency." 539 F.Supp. at 778-79. Under this standard, the district court in *Rettig* held that an ESY was not necessary because the child regressed at the beginning of the regular school year even after attending a summer program and at various times throughout the year. 539 F.Supp. at 779. On appeal, this court briefly affirmed this aspect of the district court's decision by stating that a summer program was "not necessary to permit [the child] to benefit from his instruction." *Rettig*, 720 F.2d at 466.

The district court in the present case cited and followed the standard of the district court in *Rettig* in determining that Chance would benefit from but did not need an ESY. The court explained

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5. The Court also phrased the requirement as "sufficient to confer some educational benefit upon the handicapped child." 458 U.S. at 200.

that "[t]here is no evidence that Chance would suffer significant regression of skills or knowledge without a summer program." Opin. at 10-11. The Cordreys and amici attack this holding and the underlying standard on a variety of fronts and propose other standards allegedly more faithful to their statutory source. To resolve this issue, we turn to *Rettig*.

Both parties and all amici agree that under the standard in *Rettig*, a child must prove his need for an ESY empirically, based on evidence of prior regression and slow recoupment without summer programming. As we have observed, the Cordreys and amici object that this standard is too narrow and unfair. Such a standard, they argue, works particularly harsh results where parents have provided an extended school year to their child on their own. These parents would be forced either to allow their child to regress without an ESY (thus empirically proving his need for one) or to provide on their own what they believe their child needs to make reasonable progress and is entitled to by the Act. The Third Circuit has condemned this "Hobson's choice" by rejecting, in dicta, the rule that a child must first show regression in order to demonstrate need. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988).

Evergreen's responses are twofold. First, absent hard empirical proof, a finding that a child needs an ESY could be based only on generalized statements regarding children afflicted with such a handicap. As all the experts testifying in this case agree, regression and recoupment patterns vary greatly among similarly handicapped children. Accordingly, to provide an ESY on such generalized rationale is to ignore the Supreme Court's emphasis in *Rowley* that an IEP must be based on an *individualized* assessment of the child. *See* 458 U.S. at 201, 203. Second, Evergreen continues, unless hard empirical data are required, parents can force a school district to provide an ESY by providing one for their child independently and thereby preventing the district from later showing that the child will not regress without it.

How "hard" the evidence of regression must be has apparently never been directly addressed by a court or administrative review board. In *Rettig*, the only decision from this circuit addressing whether a child was entitled to an ESY, the child participated in summer educational programs for most if not all of the several previous summers, including the one immediately preceding the lawsuit. As in the present case, there was thus little if any evidence of the child's prior regression absent an ESY. *See Rettig*, 539 F.Supp. at 774-75. Had the district court in *Rettig* or this court on appeal concluded that a child's entitlement to an ESY depended on proof of actual prior regression, it would have been easy for either to have simply said so. Neither did. Also, at least one other circuit apparently has allowed less-than-definitive proof of regression under a standard quite similar to that in *Rettig*. *See Alamo Heights Indep. School District v. State Bd. of Education*, 790 F.2d 1153, 1156-58 (5th Cir. 1986) (affirming the judgment below that a child who had received an ESY privately for several years was entitled to an ESY under the Act); *see also Armstrong v. Kline*, Civ. Act. Nos. 78-172, 78-132, 78-133, Remedial Order #2 (E.D.Pa. Sept. 5, 1979) (enunciating detailed regression standard for ESY eligibility, under which "empirical data, if any" is only one source of information); *but see Bales v. Clarke*, 523 F.Supp. 1366, 1371 (E.D.Va. 1981) (stating without discussion that a child must "show[] an irreparable loss of progress during summer months" in order to receive an ESY).

The advantages of a "hard empirical proof" rule are obvious. It is clearer and simpler to apply than reliance on conflicting non-empirical expert opinion. It gives parents an incentive to raise and resolve the issue of whether an ESY is necessary before they independently provide one to the child, when the child's regression and recoupment without an ESY can be assessed. At the same time, a policy based upon discouraging parents from structuring a child's summer months solely to gain proof of need for an ESY seems at best unfair. It seems equally unfair to penalize a child previously enrolled in private summer programs but whose situation later deteriorates so that he now might qualify for a publicly-

funded ESY. Such a penalty would be at odds with the objectives of the Act as expressed in *Burlington School Comm'n v. Massachusetts Dep't of Education*, 471 U.S. 359, 373 (1985): "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objections." Clarity and ease of application therefore must give way. Resolution of conflicting expert opinion is hardly unique to this field of law and should not be unduly troubling.

Further, Evergreen's fear that it could be boxed in by parents who present the district with ESY programming as a *fait accompli* seems exaggerated. While it is true that the district would be denied its best case against an ESY, in such a case it may still rely and, as the ultimate holding in this case illustrates, prevail on the basis of expert testimony and overall proof. Finally, the concern of the Cordreys and amici that a regression/recoupment standard, strictly defined, would stray too far from its statutory source and take on a life of its own has some merit. Professional opinions not based solely on empirical observations are less precise, to be sure, but they may in a proper case be as faithful or even more faithful to the Act's general substantive requirement of "some educational benefit" to the child.

In conclusion, then, the regression standard in *Rettig* and like cases is best interpreted not to require absolutely that a child demonstrate that he has regressed in the past to the serious detriment of his educational progress in order to prove his need for a summer program. Instead, where there is no such empirical data available, need may be proven by expert opinion, based upon a professional individual assessment.

Once the content of a proper regression standard as stated in *Rettig* is clarified, the alternatives proposed by the appellants and amici lose their persuasive force. One such standard is cited from the literature in the special education field, in which the regression/recoupment standard is widely questioned or rejected. Allegedly more professionally sound, this alternative standard

inquires whether an ESY is "critical to ongoing student progress." Browder, Lentz, Knoster and Wilansky, "Determining Extended School Year Eligibility: From Esoteric to Explicit Criteria," 13 *J. of Assoc'n for Persons with Severe Handicaps* (No. #4) 235, 242 (1988). The authors of this paper advise that need for an ESY should focus not on ill-defined terms such as regression and recoupment, but instead on measurement of explicit criteria that affect a student's ability to maintain his progress towards his IEP goals. *Id.* at 236, 242. Appellants advance a similar alternative from ESY guidelines recently issued by the Ohio Department of Education. The guidelines do not specifically mention regression or recoupment and instead would have the IEP team consider whether the child "is failing, or is likely to fail, to achieve short-term instructional objectives on the IEP due to interruption of instruction between school years." (Addendum E-4 to Appellants' brief, at 2.) However, if the existing regression-based standard for ESY is defined loosely to allow for individualized expert opinion and not just empirical predictions based on actual prior regression, the standard would seem flexible enough to accommodate such refinements in professional understanding of when a child needs an ESY. The focus of *Rettig* is clearly on the child's educational "progress," *Rettig*, 539 F.Supp. at 779, and "benefit," *Rettig*, 720 F.2d at 466. The ESY standard should be open to developments in special education science, but not bound to any particular one.

The Cordreys also propose that the *Rettig* regression standard should be broadened to the multi-factored inquiry articulated by a

federal district court in an unpublished decision in *Lee v. Thompson*, Educ. Handicapped L. Rptr. 554:429 (D. Haw. 1983). There it was held that factors relevant to whether an ESY is proper include the nature and severity of the handicap; the areas of learning crucial to progress towards self-sufficiency; and the extent of regression and the rate of recoupment following an interruption in programming. *Id.* at 430. Again, however, since the regression/recoupment standard in *Rettig* is not limited to empirical proof, the analysis suggested by *Lee* does not differ significantly.[6]

Beyond the verbal formulation of a substantive standard for ESY entitlement, the actual dispute in this case seems to center on a more fundamental issue: what is the role of an ESY within a "free appropriate public education" under the Act? Evergreen believes that the purpose of ESY programming is to allow the student to maintain the progress achieved during the regular school year. The Cordreys and amici, on the other hand, endorse the broader view of the court in *Lee*: ESY is no mere "backstop" to a regular school year, but should be "regarded as one additional means of providing a handicapped child with specialized instruction in accordance with his [IEP]." *Lee* at 554:430.

In the Cordreys' favor, it does seem arbitrary to assume even provisionally that the regular 180-day school year designed for normal learning abilities could also meet the unique needs of a

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6. At least as much is demonstrated by *Armstrong v. Kline*, *supra*, in which the court decreed that a student is entitled to an ESY if "regression caused by an interruption in educational programming, together with the student's limited recoupment capacity, renders it impossible or unlikely that the student will attain the level of self-sufficiency and independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapping condition." *Id.*, Remedial Order #2. The order further provided that this standard was not to be strictly construed only on the basis

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severely handicapped child. On the other hand, as the Third Circuit has noted, "needs are necessarily determined in reference to goals." *Battle v. Pennsylvania*, 629 F.2d 269, 276 (3d Cir. 1980). *Rowley* makes clear that in choosing goals for a handicapped child and appropriate levels of service to meet these goals, a school district is required not "to maximize each handicapped child's potential," 458 U.S. at 199, but rather to provide "some educational benefit" to the child. 458 U.S. at 200. We have no doubt that the realities of care and education of handicapped children will assure that the issue of whether a child should receive an ESY as part of the IEP will cause continued friction and litigation between parents and schools, and that the heavy custodial responsibilities of parents during the summer vacation months will conflict with the heavy financial drain upon the public fisc by a liberal attitude toward providing an ESY. Harmonizing the concerns poses no easy task. The best rule is that which recognizes that the school district has no purely custodial duty to provide for handicapped children while similar provision is not made for others. We therefore begin with the proposition that providing an ESY is the exception and not the rule under the regulatory scheme. Given those policy considerations, therefore, it is incumbent upon those proposing an ESY for inclusion in the child's IEP to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recoupable regression.

Footnote continued—

of "empirical data" and listed as relevant to applying the standard the identical factors enumerated in *Lee*.

Appellants also claim that the Fifth Circuit's opinion in *Alamo Heights* states a superior alternative to a regression/recoupment standard. Yet this claim is belied by the language of the decision: "If a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services." *Alamo Heights*, 790 F.2d at 1158. It is therefore clear that *Alamo Heights* in whole does not substantially differ from *Rettig*.

More specifically, it must be shown that an ESY is "necessary to permit [the child] to benefit from his instruction." *Rettig*, 720 F.2d at 466. The Third Circuit has persuasively held that this benefit must be more than merely *de minimis*, gauged in relation to the child's potential. *Polk*, 853 F.2d at 182, 185. *See also Alamo Heights*, 790 F.2d at 1158 (quoting *Battle*, 629 F.2d at 282 (Van Dusen, J., concurring)) ("[t]he some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought to a 'virtual standstill'"). The court in *Polk* also noted that for a handicapped child with severely limited potential, in contrast to a handicapped child such as the deaf plaintiff in *Rowley*, progress beyond an inadequate *de minimis* level may as a practical matter "require optimal benefit." 853 F.2d at 184. In such cases, it seems particularly apt to consider the *Polk* court's counsel that the child's educational progress "can be understood as a continuum where the point of regression versus progress is less relevant than the conferral of benefit." *Id.* Whatever the child's handicap and potential, however, the inquiry is essentially the same. If the child benefits meaningfully within his potential from instruction under a proper IEP over a regular school year, then ESY service may not be required under the Act unless "the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an [ESY]." *Alamo Heights*, 790 F.2d at 1158. In the latter circumstance, "the educational program offered by the School District [will] not meet the 'some educational benefit' standard of *Rowley*." *Alamo Heights*, 790 F.2d at 1159.

We conclude therefore that it is best to hold that the regression standard for an ESY in *Rettig*, as we have interpreted it here, is consistent with the Act and with *Rowley*. Worthy as the goal of providing unlimited services to handicapped children may be, courts must apply the Act as it was written and is interpreted by the Supreme Court. As one district court has commented:

> An appropriate education is not synonymous with the best possible education.... It is also not an education which

> enables a child to achieve his full potential: "even the best public schools lack the resources to enable every child to achieve his full potential." *Rowley v. Board of Education*, 483 F.Supp. 528, 534 (S.D.N.Y. 1980)[, *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982)]. Plaintiff's parents are seeking an ideal education for their child. Their aspirations are understandable, even admirable. But neither they nor any other parents have the right under the law to write a prescription for an ideal education for their child and to have the prescription filled at public expense.
>
> *Bales*, 523 F.Supp. at 1370 (citation omitted).[7]

D. Applying the ESY standard in this case

As noted above, whether the IEP provides a "free appropriate public education" is a question subject to review *de novo*, while factual determinations by the district court are accorded deference unless clearly erroneous. The factual questions here are Chance's tendency to regress, prior regression, ability to recoup lost skills, and progress toward his educational goals. The legal question is whether these facts meet the standard of significant skill losses of such degree and duration so as seriously to impede his progress toward his educational goals.

In this case, the district court found, as Chance's teacher's testified, that he lost some skills during the week or over a weekend, and that it was not uncommon for other non-handicapped children to lose skills over the summer vacation. The court also cited testimony by the Fulton County Board of Education psychologist that Chance suffered regression throughout the school year, such as after a weekend or Christmas vacation, and that in her opinion, Chance did not need an ESY. The court also

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7. We emphasize that our agreement with the *Bales* court does not extend to its empirical standard of proof for ESY entitlement. *See supra*.

noted Dr. Pittner's report, which states that Chance might regress in his behavior with as well as without an ESY, but that his risk of regression without an ESY would be unacceptable. From these findings, the district court concluded:

> There is no evidence that Chance would suffer significant regression of skills or knowledge without a summer program. This child lost skills throughout the school year. Thus, an ESY program would be beneficial for Chance, but it is not necessary to prevent significant regression of his progress toward self-sufficiency.

Dist. Ct. Op. at 11.

The Cordreys challenge this conclusion by citing other evidence in the record regarding Chance's prior experiences of regression and slow, if any, progress with regard to certain skills and behavior affecting these skills. They emphasize that Evergreen had agreed with the Cordreys to settle whether Chance should receive an ESY by having Dr. Pittner examine Chance and recommend whether an ESY was appropriate. Since Evergreen did not specify any criteria for his recommendation, the Cordreys claim, Evergreen may not now reject it. For its part, Evergreen attacks the soundness of Dr. Pittner's report, objecting particularly that he failed to utilize available comparative empirical data to assess Chance's educational progress; that he discussed only Chance's capacity to regress and not to recoup; and that he failed to consult school psychologists familiar with Chance. Evergreen cites evidence which indicates that over the month-long interruption in programming between his private ESY program and the regular school year, Chance retained some skills and lost but adequately recouped others. Evergreen also reiterates that in the opinion of the school psychologists, Chance has been progressing toward his IEP goals at a rate expected for his potential, which is admittedly slow. In response, the Cordreys dispute whether the available empirical data were meaningful and defend the soundness of Dr. Pittner's study.

Thus, the testimony regarding to what degree Chance would regress without a summer program was directly conflicting. The district court concluded from this that there was "no evidence that Chance would suffer significant regression" without an ESY. If by this conclusion the court required that his "need" for an ESY be proven purely by *empirical* evidence, we would be inclined to remand for further evaluation of the facts against the standard articulated here. Yet we do not believe that the district court's view was so narrow.

The better interpretation of the district court's conclusion is that because Chance regressed throughout the regular school year, the evidence did not show that his further summer regression would be relatively significant. Thus, an ESY would benefit him, but would not be necessary to preserve the benefits he was already receiving from his regular school year programming despite his continual regression. This conclusion draws support from the court's findings of fact and the record. Since Dr. Pittner's report did not address Chance's capacity for recoupment, the district court could legitimately rely on Chance's prior recoupment patterns and on the opinions of the school psychologists long familiar with Chance that his progress, slow as it is, does not depend on his privately-provided ESY programming. *Cf. Alamo Heights*, 790 F.2d at 1159 (in the face of expert disagreement over whether the child would regress significantly without an ESY, the district court's finding in the affirmative was clearly supported even if not compelled by the record). We therefore affirm the district court's conclusion that Chance is not entitled to an ESY under the Act.

Although Evergreen contends that it is not obliged to provide Chance with a summer program, it has nevertheless provided one or related assistance by reimbursing the Cordreys for their 1985 and 1986 costs and by directly assuming those costs in 1987-1989. This service, however, was provided under the explicit understanding that the summer program was not part of Chance's IEP and hence not subject to the stay-put provision. As we have noted earlier, to the extent the facts of Chance's development and con-

dition were such as to prompt Evergreen to furnish him with an ESY, it was error for the school district to have offered to provide it within his IEP only by exacting from his parents their agreement to exclude it from the protection of the stay-put provision. On the other hand, since we have upheld the trial court's finding under the particular facts here that Evergreen was not legally bound to provide him an ESY, its decision to move beyond the strict obligations of the statutory scheme can only be viewed as laudable and we see nothing in the Act or this decision to prevent it.

V.

The Cordreys' complaint included a claim that Evergreen discriminated against Chance on the basis of his handicap, in violation of section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The district court's opinion did not expressly address this claim. It is evident that consideration of this claim somehow fell between the cracks. In view of the undisputed evidence before the court, we conclude that we may fairly resolve this issue without the time and expense of a remand.

The claim consists of three allegations. First, the Cordreys allege that any deaf child in the Evergreen school district is automatically eligible to receive ESY services, while severely handicapped children such as Chance must demonstrate need in order to participate in the Fulton County summer program. Evergreen flatly denies this, and states that the county invites any handicapped child to enroll in its ESY. The Cordreys also allege that the summer program discriminates by segregating handicapped children from non-handicapped children within the program. Evergreen responds that intermingling of handicapped and non-handicapped children is necessarily limited because few non-handicapped children attend school beyond the regular school year. This response, like all Evergreen's responses on the discrimination claim, went unrebutted on appeal. The evidence in the record unquestionably is inadequate to satisfy the Cordreys' bur-

den of proof here. Finally, the Cordreys claim that Evergreen discriminated by failing to provide Chance with an ESY. This claim stands or falls with their claim under the Education of the Handicapped Act. Since we have upheld the district court's ruling that the denial of the ESY was proper, there is nothing further in the record to suggest that its denial was discriminatory within the meaning or intent of the Rehabilitation Act.

AFFIRMED.

APPENDIX B

Opinion of the United States District Court
(Dated December 9, 1988)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHANCE CORDREY, et al.,
Plaintiff(s),

— vs —

R. J. EUCKERT, et al.,
Defendant(s).

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The parties have agreed that this court should enter judgment in this case based on the record of the administrative proceedings, supplemented by depositions subsequently filed by the plaintiffs', defendants' responses to plaintiffs' request for production of documents and defendants' answers to plaintiffs' interrogatories.

This action is brought by plaintiffs Karen and Robert Cordrey on behalf of their minor son, Chance Cordrey, pursuant to the Education of Handicapped Act [hereinafter "EHA"], 20 U.S.C. § 1415(e)(2). Plaintiffs ask the court to order Evergreen Local School District to provide their son with an extended school year program [hereinafter "ESY"] in 1988, and to find that he was entitled to such a program in 1987. Plaintiffs also seek reimbursement for the cost of their son's attendance of a summer program

in 1987 and 1988. They also ask this court to order that their son be provided with a summer program in the future which includes at least eight to ten weeks of instruction, five days each week, at least five and one half hours each day. They ask that this program follow their son's individualized education program [hereinafter "IEP"] and include one-on-one instruction, transportation and other related services during the school year. The plaintiffs also ask that the program be subject to the maintenance placement provisions of the EHA if disputes arise in the future.

FINDINGS OF FACT

1. The plaintiffs, Karen and Robert Cordrey, and their minor son, Chance, reside within the Evergreen Local School District in Fulton County, Ohio.

2. Defendants are R.J. Euckert, superintendent of Evergreen Local School District, Fulton County, Ohio; board members, Gregg Simon, Mariann Gleckler, Richard Napierala, Carol Kleck and Loren Pennington; the Evergreen Board of Education; and the Evergreen Local School District.

3. Chance's behavior is that of an individual who is out of control, i.e., he doesn't understand proper conduct either in public or in private. For instance, he cannot be alone outside because he doesn't understand the danger of cars. Chance also exhibits poor eye contact, poor eating habits, poor coordination, and poor socialization.

4. An IEP was formulated for Chance for the 1981-82 school year. He was placed at Glendale-Feilbach school in a multihandicapped, or MH class. A team of professionals and Chance's parents decided to place him in the Toledo school. Each day, the school provided occupational and physical therapy services, and a speech and language therapist. The classroom ratio was a maximum of eight students to one teacher and two aides.

5. Since his placement in 1981, Evergreen and the Cordreys have agreed to Chance's continued placement in the MH class in Toledo. Stipulations 3 and 4.

6. In 1982, the Cordreys enrolled their son in the Toledo Autistic Society summer education program. The Cordreys did not ask and Evergreen did not pay for the cost of the Toledo Autistic Society program in 1982. Stipulation 5.

7. In May, 1984, the plaintiffs requested that Evergreen provide an ESY at Toledo Autistic Society for their son's IEP. Stipulation 6. An ESY program is an organized program beyond the usual 180 [day] (sic) school year.

8. On July 15, 1985, the Evergreen Board of Education decided that Chance should receive an ESY program during the summer at a county program rather than the Toledo Autistic Society program. Stipulation 7. The county program was called FCBMR/DD.

9. In November, 1985, an IEP meeting was held, but the parties were unable to reach an agreement regarding summer services. Stipulation 8.

10. The parties negotiated an "Agreement and Mutual Release" in May, 1986, which included a process by which the ESY program would be dealt with during the 1986-87 school year. Stipulation 9. The agreement provided for Dr. Mark S. Pittner, a psychologist, to conduct an evaluation of Chance. Dr. Pittner practices at the Clinical Psychologist & Associates in Toledo, and is a consultant at the Perinatal Unit of Toledo Hospital and at Cummings-Zucker Center in Toledo. He also acts as a mental health consultant to the Toledo Head Start Project.

11. Dr. Pittner completed an evaluation in April, 1987, and concluded that Chance would benefit from an ESY program. Stipulation 10. Dr. Pittner stated in his report that it was impossible to assess whether an ESY program was neces-

sary for Chance rather than merely beneficial. Dr. Pittner reported that the Cordreys had indicated that Chance was in constant need of structure, direction and one-to-one contact.

Dr. Pittner testified that Chance might lose behavioral and other gains from the regular school year, thus, he might regress without an ESY program. He stated that even with an ESY program, Chance could experience some regression. Dr. Pittner explained that the need for the ESY program is an individualized one. Based on statements of Dr. Veronica Gold, Toledo Autistic Society program director, Dr. Pittner explained that Chance had lost some sign language skills during the year that he was in the Fulton County Training Center summer program. However, Dr. Pittner said he was unaware of the year that this occurred.

12. On May 5, 1987, plaintiffs met with the superintendent of Evergreen Schools, Nancy Miller (a psychologist for the Fulton County Board), a psychology intern and counsel for the parties. Chance's teacher did not attend. Based on Dr. Pittner's opinion that the failure to place Chance in an ESY program would pose an unacceptable risk of regression, the parties agreed that Chance should be enrolled in an ESY program during the summer of 1987. Stipulation 12. Evergreen suggested that Chance should be placed in the county "summer action" program. The Cordreys wanted Chance to be placed in the Toledo Autistic Society program. Stipulation 13. The Evergreen Board refused to place the ESY program on Chance's IEP unless the plaintiffs agreed to exclude the program from the maintenance placement provisions of 20 U.S.C. § 1415. Stipulation 14.

13. In response to the plaintiff's charge that this IEP meeting was improperly constituted, the school district representatives offered to hold a formal IEP meeting with the teacher present. The plaintiffs refused the offer because

"Evergreen stated it would not place ESY in the IEP unless I waived the maintenance of placement provisions of 8PL94-142 and O.R.C. 3323, [and] I saw no purpose for attending another IEP meeting." Affidavit of Karen Cordrey ¶ 7.

14. The maintenance of placement provisions of PL94-142 provide that a handicapped child's placement be undisturbed during the pendency of an IEP hearing, a due process hearing or any appeals therefrom.

15 Nancy Miller, a Fulton County Board of Education school psychologist, stated that Chance suffered regression at different periods of time throughout the school year, such as after a weekend or Christmas vacation. Her opinion was that Chance did not need an extended school year program.

16. Ms. Judy Jacso, Chance's teacher, was of the opinion that Chance would benefit from an ESY program of eight weeks, five days a week, and five and one half hours a day. Ms. Jacso stated that Chance lost some skills during the middle of the week or over a weekend and that it is not uncommon for other children to lose skills after a summer vacation.

CONCLUSIONS OF LAW

1. Jurisdiction is predicated upon the Education of Handicapped Act [hereinafter "EHA"], 20 U.S.C. § 1415(e)(2) and 28 U.S.C. § 1331.

2. In this case, a *de novo* review is authorized by 20 U.S.C. § 1415(e). The court must base its decision on a preponderance of the evidence. *Id.* However, the court must give due weight to the determinations made in the state administrative proceedings. *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), *cert.denied*, 104 S. Ct. 196 (1984). The *Roncker* court acknowledged that the appropriate standard review was established in *Hendrick Hudson District*

Board of Education v. Rowley, 458 U.S. 176, 206 (1982). The Act provides that a district court "shall review the records of the administrative proceedings, shall hear additional evidence at the request of the party, and basing this decision on the preponderance of evidence, shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415(e)(2).

3. Evergreen is required to provide Chance with a free, appropriate public education and related services. Stipulations 1 and 2. The education must meet reasonable state educational standards and provide specifically designed instruction and related services. 20 U.S.C. § 1401(16-19).

4. The Act defines the term "handicapped children" as individuals who are "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education or related services." 20 U.S.C. § 1401(1). Chance is a "handicapped child."

5. Programs which are tailored to the needs of the children are called IEPs. 20 U.S.C. § 1401(19). Congress has set forth certain statutory procedures in the formulation of an IEP. 20 U.S.C. § 1415. Any meeting of a representative of the local education agency, in this case Evergreen Local, can be an IEP meeting. 20 U.S.C. § 1401(19). The federal regulations provide for such meetings to be held for the purpose of developing, reviewing and revising a child's program. 34 C.F.R. § 300.343. The regulations also require that such a meeting be held at least once a year to revise the program. *Id.* In addition, the regulation states that the public agency should initiate the meeting. *Id.* Parents, however, can request that a meeting be held, and that the agency must grant any reasonable request. 34 C.F.R. § 300.343 Appendix C, Part 300.

6. The May 5, 1987, meeting was an IEP meeting. The purpose of the meeting was to discuss the possibility of placing an ESY on Chance's IEP, and in their 1986 Agreement, the district and the parents agreed to hold an IEP meeting to discuss these issues. This meeting was held within the time frame of the IEP meeting requested by the parents.

7. The Cordreys waived their statutory right to a properly constituted IEP meeting when they rejected the district representative's offer to hold a properly constituted IEP meeting subsequent to the May 5, 1987 meeting. Individuals may waive such a statutory right. *Allerton Construction Corp. v. Fairway Apartments Corp.*, 267 N.Y.S. 2d 860, 49 Misc. 2d 525 (1966), *aff'd*, 26 A.D. 2d 636, 272 N.Y.S. 2d 867; *Halsrud v. Brodale*, 247 Iowa 273, 72 N.W.2d 94 (1955); *Sartin v. Hudson*, 143 S.W.2d 817, 821-23 (1940). "A waiver is an intentional relinquishment of a known right." *Palfy v. Cardwell*, 448 F.2d 328, 332 (6th Cir. 1981); *American Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316, 318 (6th Cir. 1950); *United Firemen's Insurance Co. v. Thomas*, 82 F. 406 (7th Cir. 1897), *aff'd*, 92 F. 127 (C.C.A. Ill. 1899). Once a waiver is valid, the pergon who waived this right cannot make any claims that the right was violated. *United Firemen's Insurance Co. v. Thomas*, 82 F. at 409. To be a valid waiver of a statutory right, the waiver must be exercised knowingly, voluntarily and intelligently. *Leaman v. Ohio Department of Mental Retardation*, 825 F.2d 946, 956 (6th Cir. 1987) *cert. denied*, 108 S. Ct. 2844 (1988); *Palfy v. Cardwell*, 448 F.2d at 332. The burden of proof is upon the party claiming the waiver. *Masden v. Travelers Ins. Co.*, 52 F.2d 75, 76 (8th Cir. 1931). The Cordrey's knew of their right to a properly constituted IEP meeting. With the benefit of advice of counsel, they intentionally rejected the offer of another meeting after they concluded it served no purpose. Moreover, plaintiff's rejection of defendant's offer to hold a properly constituted IEP meeting subsequent to May 5, 1987, was unreasonable.

There is no evidence that the defendant would not have placed the ESY on Chance's IEP without the waiver of the maintenance provisions after evidence was adduced at a subsequent IEP hearing that Chance would suffer significant regression without a summer program.

8. There is no evidence that defendants violated any other provisions of the EHA or of the laws of Ohio.

9. Even with the most liberal reading of the EHA, this statute does not mandate ESY programs for all students. The statute merely requires that states demonstrate that they have a policy in effect which assures all handicapped children the right to a free appropriate public education. 20 U.S.C. § 1412(1).

10. The parents bear the burden of demonstrating that serious regression would occur without an ESY program. *In re: San Luis Obispo County Schools*, EHLR 502: 111 (1980). The court in *In re: Canton Public Schools*, EHLR 503: 235, 238 (1982) found that the burden was on the parents to prove that the youngster will substantially regress without an ESY program.

11. An ESY program is only mandated when it is a necessary, not just beneficial component of an appropriate education for the child. *Rettig v. Kent City School District*, 539 F. Supp. 768 (N.D. Ohio 1981) *aff'd* 720 F.2d 463 (6th Cir. 1983). The standard is whether the burden of proving that an ESY program would prevent significant regression of skills or knowledge and whether this regression would seriously affect the child's program toward self-sufficiency. *Id. See also Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (llth Cir. 1983), remanded on other grounds, 101 S. Ct. 3581 (1984), modified on remand, 740 F.2d 902; *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983); *Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980); *In re Sparta Area Board of Education*, EHLR

506:248, 299 (Wis. 1984); *Educational Assiqnment of Shaun P.*, EHLR 508:242, 244 (1986); *S.M. v. Ridgewood Board of Education*, EHLR 506:298, 304 (N.J. 1984).

12. There is no evidence that Chance would suffer significant regression of skills or knowledge without a summer program. This child lost skills throughout the school year. Thus, an ESY program would be beneficial for Chance, but it is not necessary to prevent significant regression of his progress toward self-sufficiency.

13. Defendant has not violated the stay-put provision of the EHA, 20 U.S.C. § 1415(e)(3), which states that a child will remain in a current educational placement pending any appeal. This provision only applies where a placement is a part of an IEP. There is no ESY placement provision in Chance's IEP.

It is therefore

ORDERED that judgment is awarded in favor of the defendants and against plaintiff;

FURTHER ORDERED that this cause be dismissed at plaintiff's costs.

RICHARD B. MCQUADE, JR.
United States District Judge

APPENDIX C

The Local State Referee Opinion

(Dated April 16, 1988)

IN THE MATTER OF CHANCE CORDREY AND THE EVERGREEN LOCAL SCHOOL DISTRICT

PROCEDURAL STATUS:

This case is before the Referee as a result of an appeal requested on February 15, 1988 by the Evergreen Local School District from a decision by Hearing Officer Jerry W. Lee rendered on February 5, 1988. The due process hearing was requested by the parents, Mr. and Mrs. Robert Cordrey, on May 11, 1987. The hearing was held on December 7 - 11, 1987. The State Level Reviewing Officer or Referee was appointed by the Superintendent of Public Education on February 19, 1988.

There was some difficulty and delay in the transmission of the record, and in fact, the Referee did not receive the entire record until March 25, 1988. The Record consists of five volumes of transcript, Parents' exhibits 1 - 69, District's exhibits A, C - G, Parents' Motion for Summary Judgment, District's Motion opposing same; Parents' Motion in Reply to above, a set of Stipulations with 8 attachments, affidavits of Joseph DeRose and Karen Cordrey, Parents' pre-hearing brief on standards for an extended school year, the District's post-hearing brief, the Parents's post-hearing proposed findings of fact and conclusions of law, and the decision of Hearing Officer Lee.

FINDINGS OF FACT

1. Robert and Karen Cordrey, along with their son Chance Cordrey, reside in the Evergreen Local School District in Fulton County, Ohio. It is stipulated that Chance Cordrey is a "handicapped child" as defined by Public Law 94-142, *The Education of All Handicapped Children Act*, 20 U.S.C. Section 1401 et seq. (sic) and Ohio Revised Code Chapter 3323. Evergreen is required to provide Chance Cordrey with a free, appropriate public education and related services under federal and state law.

2. Prior testing and an evaluation in April of 1987 revealed that Chance's current intellectual functioning falls near the 18 month age level, with speech and fine motor skills falling well below this, and some skills above this level. (Exh. 46). Chance has pervasive severe to profound delays in all areas including cognitive functioning, speech and language, social adaptive and social emotional skills (Tr. 227 et seq. (sic)) and problems generalizing skills from one situation to another (Tr. 233-34). Chance also exhibits autistic-like behaviors. (Tr. 221., Exh. 46).

3. For the 1981-82 school year, Evergreen and the Cordreys considered placement of Chance into the Fulton County Board or (sic) Mental Retardation and Developmental Disabilities (hereinafter FCBMR/DD or the county program) but agreed to place the child in the multihandicapped class (hereinafter MH) located at the Glendale-Feilbach School in the Toledo Public School District, Lucas County, Ohio. (Stipulation #3). Since his original placement there, Evergreen and the Cordreys have agreed to Chance's continued placement in the MH class in Toledo for every subsequent school year.

4. The Cordreys enrolled Chance in the FCBMR/DD summer program in 1980 and 1981. This was a unilateral placement by the parents. The Cordreys believed and still do believe that summer programming is necessary for Chance

to maintain learned skills through the summer to enable him to progress from year to year. (Tr. 145.) The parents and some of his teachers noticed that Chance regressed at times over short breaks from school (holidays, weekends, etc.,) causing a decrease in listening and attending skills and an increase in undesirable and inappropriate behaviors. (Tr. 81-82, 145-6, 294, 288).

5. In the summer of 1982, the Cordreys enrolled Chance in a summer program operated by the Toledo Autistic Society (hereinafter TAS), a not-for-profit private agency located in Lucas County, Ohio. The MH class in Toledo did not operate during the summer. Evergreen was not requested to, nor did it, pay the cost of the TAS program in 1982. (Stipulation #5).

6. In May, 1984, the Cordreys requested that Evergreen provide an extended school year (hereinafter ESY) or summer program for Chance. (Tr. 72-73).

7. In the past, summer programming has been provided by the Evergeen District for hearing impaired children only. (Tr. 744 et seq.). These children were not required to exhibit regression, nor was the summer programming written on their IEP's. None of the other multi-handicapped children in Fulton County have IEP's which call for extended school year services. (Tr. 318).

8. On July 15, 1984, Evergreen offered to provide Chance Cordrey with ESY services through the FCBMR/DD program. (Stipulation #7). There is no cost for the program to the district (sic).

9. On November 14, 1985, an IEP meeting was held for Chance. The parties were unable to reach an agreement regarding summer services. (Stipulation #8). The parties disagreed as to the need for ESY and as to which of two programs, if either, were appropriate for the child. The parents preferred the TAS program and the District preferred the county

board program. To avoid litigation, the parties entered into an Agreement and Mutual Release in May of 1986 (Exhibit 40). The Agreement provided the following:

A. The board would reimburse the Cordreys for the costs of Chance's attendance at the TAS program for the summers of 1985 and 1986 at the rate it would have paid if it had directly provided the program through Fulton County. The parties stipulated that "it was necessary to provide Chance summer programming to offset significant regression from progress towards goals and objectives of his IEP during the preceeding academic year with respect to which the parties anticipated delayed recoupment in the absence of extended school year programming".

B. The parties, in an effort to establish a basis for determining need for ESY for 1987, agreed to an evaluation for Chance to determine whether he needed ESY, and if so, which types of programs would be appropriate for him to meet his needs.

C. The parties agreed further that an IEP conference would be held on or about April 7, 1987, to discuss the results of the evaluation.

10. The parties eventually selected Mark S. Pittner, Ph.D. to conduct an evaluation of Chance. Dr. Pittner explained at the outset that he could not empirically measure whether or not Chance needed ESY, that the best he could do was to give a professional opinion on that point. Both parties, knowing this, consented for him to perform the evaluation.

11. Dr. Pittner's report is Exhibit 46 and was completed in April, 1987. In it he states that:

A. He believes the risks of not providing ESY for the child are "unacceptable";

B. That the child will benefit greatly from ESY;

C. That the IEP should be followed closely during the ESY;

D. That the child needs one-to-one attention to demonstrate what he has learned;

E. That between TAS and the Fulton County Program, plans for which were not yet final, he believed the TAS program was better;

F. He believed the minimum service necessary to maintain Chance's skill would include an 8 - 10 week program, 5 days a week and 5 -6 hours per day. (Tr. 248, 255-6).

12. The parties met on May 5, 1987, to discuss Dr. Pittner's report. The parents understood this to be the IEP meeting required to be held per the Agreement on April 7, 1987. (Tr. 129). The District did not consider this meeting a formal IEP meeting, even though no other IEP meeting had yet been held for Chance at this time. The meeting was short, the Parents walked out of it, and no IEP was drafted, referred to, nor were any IEP goals or objectives established or referred to. (Tr. 129-130). Neither the child's classroom teacher nor Dr. Pittner were invited to the meeting. (Tr. 251, 449). No representative from the county program was present, either.

13. During this meeting, Evergreen offered to place Chance at the FCBMR/DD summer program based upon Dr. Pittner's opinion that the absence of a summer program would impose an unacceptable risk of regression. It was (and remains) the position of the parents that Dr. Pittner's report established that Chance "needed" ESY, that the report also stated that the TAS program as appropriate and the FCBMR/DD program was inappropriate.

14. It is stipulated that at the time of Dr. Pittner's report, the county program was not determined. The program had varied in length and substance over the years (Tr. 553), and at the time of the May 5th meeting, it was uncertain whether

the program would have certified teachers, whether the student's IEP's would be followed; whether any certain number of classroom aides would be provided, the number of hours per day, days per week and weeks per year the program would operate. (Tr. 558). At the time of the meeting, no one from the Evergreen administration had consulted with the county board staff to determine if Chance's needs could be met there. (Tr. 504).

15. The Agreement and Mutual Release signed by the parties contains a recitation that there was a "need" for ESY for 1985 and 1986. The District contends that the recitation was included solely upon legal advice in order to justify the expenditure to the state. (Tr. 769). The District contends that no need for ESY has been demonstrated.

16. Even though Evergreen offered to place Chance in the county board summer program, it refused to put ESY on the child's IEP unless the parents agreed to waive the "maintenance of placement" provisions of 20 U.S.C. Section 1415 and O.R.C. Chapter 3323. (Tr. 131, Stipulation #14). The parents refused to waive these provisions, and requested an impartial due process hearing on May 11, 1987.

17. The testimony of Chance's teacher Judy Jacso, was that in nearly all areas, Chance maintained his level of skill from May, 1987 until September 1987. During the summer of 1987, Chance attended a TAS summer program from June 20th until August 8, 1987 (Exh. 38).

FINDINGS OF FACT RELATIVE TO DUE PROCESS:

The findings of fact relative to due process issues as found by the Hearing Officer are hereby adopted in their entirety.

POSITION OF THE PARTIES:

The parents contend that the child needs ESY, that without it he is unable to benefit from his special education, that it should be on the child's IEP, and that it should be subject to the "maintenance

in place" provisions of the law. They also argue that the county board program is inappropriate, and that the district (sic) made a placement decision on May 5, 1987 improperly, in that it was not a properly constituted IEP meeting, the teacher was not present as required by law, and the goals and objectives of the child's IEP were not discussed, nor was the placement decision made with reference to them.

It is the position of the District that the child does not need ESY in order to benefit from his special education, that therefore it is not required to provide ESY to him, and as a result, it need not be on his IEP, where it would be subject to the maintenance in place provisions of the law. The school contends that no need for ESY has been shown, that the parents have the burden of proof and have failed to meet it.

DECISION:

The opinion of the hearing officer is reversed: The parents had the burden of proof that the child needed ESY in order to benefit from his education; they failed to carry such burden. No such need has been established. Therefore the District is not required to provide an extended school year for the child; nor need it be on his IEP.

LEGAL ISSUES:

I. BURDEN OF PROOF

Decision: The party which proposes to change the child's education placement or services by adding services bears the burden of proof that such addition is necessary for the child to benefit from his special education. In this case, the parents seek to have an extended school year (ESY) added to the child's IEP so that the District will be required to provide it. The parents, therefore, bear the burden of proof that ESY is needed, i.e., necessary for child to benefit from his education.

Rationale: In *Henrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982), the United States

Supreme Court took on and clarified the thorny issue of how much special education must be provided a handicapped child. The chief issue before it was that of quantification, i.e., how much is required, how much is enough. The court held that a school district is not obligated to maximize the educational opportunities for a handicapped student. A local district (sic) need only provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." 73 L.Ed. 2d at 710. School districts have the responsibility to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201.

In this case, the parents contend that the services being provided by the school district are insufficient for the child's needs. They seek additional services. If the District were providing no services in the face of a demonstrated need, perhaps the burden would be that of the District's. In any event, since the child is receiving considerable services from the district, and the parents seek more services, it is incumbent upon the parents to establish the fact that such additional services are needed by the child in order for him to benefit from his education. See *Bales v. Clarke*, 523 F.Supp. 1366 (E.D. Va. 1981)

II. DEMONSTRATING A NEED FOR AN EXTENDED SCHOOL YEAR

Decision: In determining the need for an extended school year, it must be shown that without the requested services, the child is unable to receive educational benefits from his special education, that is, he will not make reasonable progress towards self-sufficiency. The expected regression must be so severe in critical areas and the recoupment so slow, that the child is not likely to make reasonable progress towards his IEP goals during the academic year.

Rationale: Whether or not an extended school year is warranted depends on the extent to which the interruption of the educational program will result in regression and loss of skills over the summer vacation. *Battle v. Pennsylvania*, 629 F.2d. 269 (3rd Cir. 1980), *cert. den.* 452 U.S. 968 (1981). Comparison must be made between the amount of regression and the probability of regaining any skills which are lost. The regression must be extraordinary or irretrievable, leading to an "irreparable loss of progress". *Bales v. Clark.*, supra. In an Ohio case, the Court held that an appropriate education (for a similarly profoundly handicapped child) is one which gives the child a reasonable chance to acquire the skills he needs to function outside of an institution. It does not mean that a school system has to provide any and all services that might be beneficial. Whether a summer school program is a necessary component of an appropriate education depends upon whether it would prevent significant regression of skills or knowledge retained...so as to seriously affect his progress toward self-sufficiency. *Rettig v. Kent City School District*, U.S.D.C., N.D. Ohio 1981 (sic). Other cases hold to similar standards: "severe regression and limited ability to recoup", "irreparable loss of progress": (*Bales v. Clark, supra*); "significant regression in developmental level and limited ability to recoup; significant jeopardy of skills and benefits": (*Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986); if child has not met short term IEP goals by mid-term (*Battle v. Pennsylvania, supra*). *Rowley* demands that the special education be sufficient to confer education benefits. Obviously, if said benefits are completely or substantially lost over the summer, an ESY would be needed. If the child is making no progress from year to year, more is needed under the *Rowley* test.

The parents contend that they need not show actual severe regression, that they need only show the risk that the child's progress towards self-sufficience (sic) will be seriously jeopardized. They further argue that the five-prong test used by the court in *Lee v. Thompson*, (No. 80-0418, slip op., D.HI. April 8, 1983) should be applied here (an analysis of the nature of the handicap,

the severity of it, whether the regression is in areas critical to independence; the amount of regression and severity of the recoupment problem). Even if this test were to be applied here, the Parents have not met the burden of proof the Lee (sic) analysis imposes.

FACTUAL ISSUE:

DOES CHANCE CORDREY NEED AN EXTENDED SCHOOL YEAR IN ORDER TO BENEFIT FROM HIS SPECIAL EDUCATION?

Decision: The parents have not sustained the burden of proof that Chance cannot benefit from his education without an extended school year.

Rationale: In examining the testimony to determine whether the parents have provided evidence to show that without an extended school year, Chance will not reap educational benefits from his education, one must conclude that they have not. The record demonstrates that Chance is making progress from year to year, and as a matter of fact, his teacher at the time of the hearing in December had recently revised his IEP in order to add more difficult goals to it, as the child had mastered the earlier goals. (Tr.434.).

Chance's present teacher is Judy Jacso, who also taught him last year. In her testimony she compared his skill level from the end of school in May, 1987 to the beginning of the following year in September, 1987, and commented upon his present skill level (the hearing was held in early December 1987.) Chance attended an eight week program at TAS during the summer. He was out of school from August 8th until September 3, 1987.

Chance has behavioral problems, and exhibits autistic- like behaviors, that interfere with his ability to learn. (Tr. 416). This fall, at the beginning of the school year, Chance's autistic-like behaviors were still, for the most part, under control, i.e., he had

maintained his ability to control them over the summer. (Tr. 418). Chance also maintained his ability to refrain from disruptive behaviors. (Tr. 421). Over the past year or so, Chance's disruptive behaviors have decreased. (Tr. 419).

On Chance's IEP for last year, his first goal was to match, through tactile clues, like objects that are long and short. By May, 1987, he reached 80% accuracy on this goal. In September, his accuracy was about the same. (Tr. 430). By the time of the hearing, Ms. Jacso had upgraded the task to have him use visual, rather than tactile, clues. She testified that this is a step up, i.e., the next level of difficulty of the task. (Tr. 431).

Chance's IEP for last year, goal two, related to learning general concepts, such as "in", "out", "over" and "under". By May 1987, he had reached about 80% accuracy on this goal. By September, he had maintained "in" and "out", but lost a little on "over" and "under". By December, 1987, Ms. Jacso increased the difficulty of this task by adding more concepts. (Tr. 433). Objective number two, goal one, from the 1986 IEP was expanded in 1987 by adding four concepts. (Tr. 435). On Chance's second goal, objective one, from the 1986 IEP, communication pictures, he reached about 80% accuracy by the end of the 1987 school year. By September, 1987, Chance maintained his skill level and by December, two new pictures had been added. (Tr. 436.)

Ms. Jacso's testimony continues for page after page, in which she testifies that on nearly all of his IEP goals, Chance is progressing. On most of his goals, he was able to maintain his level of skill over the summer break (the month of August). (Tr.436 -449).

As with the IEP's of other children in Ms. Jacso's MH class, Chance's IEP goals often continue from year to year. (Tr. 464). Some regression in September is common among her students and indeed among all children. (Tr. 470). The losses which Chance demonstrated in September are not greater in magnitude than the usual losses of other children in her class. (Tr. 471). She testified that is was (sic) common for non-verbal children to have the same

or similar goals on their IEP's from year to year. (Tr. 472). In fact, it is reasonable to expect that some goals might remain on Chance's IEP all his educational career. (Tr. 473). Although Ms. Jacso agrees with Dr. Pittner that the risk of regression due to lack of an ESY is unacceptable, she testified that Chance is making steady, slow progress. (Tr. 479).

Dr. Pittner testified that Chance was making slow, gradual improvement (Tr. 223, 226, 241). He testified he went over Chance's IEP with Ms. Jacso to determine whether the goals were realistic and whether the child was making progress. (Tr. 235). He testified that the goals were realistic for a child with Chance's limitations and that he was making slow steady progress. (Tr. 241). Dr. Pittner admitted that Chance was likely to regress at times even if he is provided a summer program. Ms. Jacso's testimony, however, demonstrated that this is not necessarily so. Chance did not regress over a four-week break between the end of the summer program and the beginning of the school year.

Another item of evidence that this reviewing officer found persuasive was Plaintiff's Exhibit 38, the exit report from the TAS summer program. Chance missed school for an entire week from July 20, a Saturday, until July 29, the Monday he returned to class. Yet on every goal on the report, when he returned he was at the same level of skill as when he left. For every area in which a daily chart is provided, (behavior, math, language, self help, table setting), his skill level is as good or better than before missing the week at school.

The evidence does not demonstrate substantial, severe, regression which might jeopardize Chance's educational progress. The weight of the evidence does not support a finding of a risk of severe regression coupled with serious recoupment problems, which are likely to prevent Chance from making reasonable progress in his educational goals. In fact, he is making reasonable progress.

The problem here is that there has never been a summer in which the child has not had a summer program, so there is no

empirical or objective data as to whether the child will regress to such an extent that he will be unable to make reasonable progress the following year. The question therefore becomes how to tell if the lack of a summer program will cause severe regression and extraordinarily slow recoupment. Dr. Pittner testified that the only way to measure it is to examine school records over time. Ms. Jacso's testimony, however, does exactly that, it examines and demonstrates Chance's progress over time.

Dr. Pittner was asked to determine whether Chance needed an ESY. He stated that such a need cannot be measured. He testified that he understood that he was being asked to assess *which* program was better, more than he was being asked to assess *if* a need was present. (Tr. 283, 338, 349). The most that he can say about the need issue is that in his opinion it is an unacceptable risk of loss of progress both behaviorally and academically.

Considering that Mrs. (sic) Jacso says the child is making progress and that in fact, he is maintaining skills over a month-long break during August, and that she is revising his IEP goals because he is meeting his short term goals and exceeding them, one cannot conclude that the child is not progressing, i.e., not deriving benefits from his special education.

Dr. Pittner also admitted that he could not find that the country board program was inappropriate, merely that the TAS program was better, that is, it had proven advantages. (Tr. 289). He could not determine what, if any regression would occur in the absence of a summer program or whether the recoupment would be delayed to a greater extent than it would with other similarly handicapped children. (Tr. 298).

Ms. Nancy Miller, the school psychologist for Fulton County, testified that in her opinion, either program was appropriate (Tr. 653) and that she believes the Pittner report (Exhibit 46) supports that position.

Mr. Jerome Zake, the school psychologist for the Toledo Public schools (including Glendale-Fielbach, where Chance attends), has

known Chance for about four years. (Tr. 701). He testified that Chance's educational growth is reasonable based upon his limitations. (Tr. 704). Mr. Zake is on a committee to determine standards for ESY for the Toledo School District and has provided Ms. Jacso with criteria for this determination. (Tr. 705, 706). Mr. Zake testified that the continuity of progress on Chance's IEP goals indicates no need for ESY, particularly since he is showing progress in three critical areas: self care skills, decrease of maladaptive behaviors, and acquisition of communication skills. (Tr. 708). He believes that Chance's regression, if any, is not documented. (Tr. 709). Mr. Zake has taught at the TAS summer program and he believes that it offers no advantage over a public placement. (Tr. 722).

Mr. DeRose, former Superintendent of Evergreen Local School District, testified that at no time has he been presented with an actual determination of Chance's need for ESY. (Tr. 768). He stated that the recitation of need found in the Agreement and Mutual Release between the parties was inserted upon the advice of the District's attorneys in order to justify the expense. (Tr. 769). He testified that ESY was not put on Chance's IEP because no need has ever been shown, but that the District was willing to provide him with an ESY rather than to litigate the issue.

Dr. Randall J. Euchert, the present Superintendent of Evergreen Local School District testified (incorrectly) that he could overrule any decision made by an IEP team. (Tr. 842).

Mr. Stull-Barnes, the coordinator of the County Board summer program, testified that the program could have been tailored to Chance's needs, followed his IEP, and used his particular behavior coping device. (Tr. 526). Chance could have been kept in from distracting field trips. (Tr. 587, 634). It is likely that the program could have been provided with an additional aide. (Tr. 589). The evidence does not show that Fulton County Board summer program would have been inappropriate. (Tr. 502, 526).

OTHER ISSUES:

If the meeting on May 5th, 1987 was an IEP meeting, it was violative of federal and Ohio law, in that the child's teacher was not present, and the placement decision was made without reference to the child's IEP goals. There is some question as to whether the meeting was intended to be the IEP meeting. After the parents objected, the District offered to hold another IEP meeting with the teacher present. The parents refused.

If the evidence had shown that Chance needed ESY in order to benefit from his education, then the district would have been required to put it on his IEP, and it would have been subject to the "stay put" provisions. However, if the need is not established, then it need not be on the child's IEP, and the district need not provide it.

CONCLUSIONS OF LAW:

1. Mr. and Mrs. Robert Cordrey failed to establish that their son, Chance Cordrey, needs an extended school year in order to behefit (sic) from his special education.

2. The Evergreen Local School District did not violate federal or state law when it refused to put an extended school year on Chance Cordrey's IEP.

ORDER:

The decision of Hearing Officer Jerry W. Lee in this matter is REVERSED.

Marilyn C. Reece
4/16/88

APPENDIX D

Final Decision of the Impartial Hearing Officer
(Dated February 5, 1988)

STATE OF OHIO
DUE PROCESS HEARING
IN THE MATTER OF:

CHANCE CORDREY,
Petitioner,

— vs —

EVERGREEN LOCAL SCHOOLS
Respondent,

FINAL DECISION
FINDINGS OF FACT AND CONCLUSIONS OF LAW
NOTICE OF OPPORTUNITY FOR APPEAL

SUMMARY

1. Impartial Due Process Hearing on Behalf of Chance Cordrey.
   Address: 2-14963-1, Swanton, OH 43558

2. Date of Hearing: December 7-11, 1987.
   Hearing Initiated by: Parents

3. School District: Evergreen Local Schools
   County: Fulton
   Address: P.O. Box H 1-14544-6
   Metamora, OH 43540
   School District Representative: B. Gary McBride, Esq.
   Address: 1000 National Bank Building,
   Toledo, OH 43604

4. Parents: Robert Cordrey and Karen Cordrey
   Address: 2-14965-1, Swanton, OH 43558
   Parents' Representative: Susan Tobin, Esq.
   Address: Ohio Legal Rights Service, 8 East Long Street
   Fifth Floor, Columbus, OH 43215-0523

5. Date of Written Request for Hearing: May 11, 1987
   Date Final Decision Submitted: February 5, 1988

6. Impartial Hearing Officer: Jerry W. Lee, Esq.
   Address: 519 West Wooster Street, Bowling Green, OH 43402

7. Statement of Issues from Written Request for Hearing. (Ex. 49):

The issues raised by the Cordreys include the following substantive and procedural allegations:

1. Evergreen Local School District is failing to provide Chance Cordrey with a free and appropriate public education and

necessary related services by proposing on May 5, 1987, to place Chance in a program which the Fulton County Board of Mental Retardation and Developmental Disabilities intends to open and operate during the summer of 1987. The evaluation report authored by Mark Pittner, Ph.D., clearly stated the benefits of the Toledo Autistic Society's summer program. Subsequent to the meeting of May 5 between the Cordreys and Mr. DeRose, counsel for the Cordreys contacted Mr. Pittner to discuss his report. Mr. Pittner indicated that he could *not* conclude that the Fulton County program would be appropriate to meet Chance's needs because the content of the program had not been finalized. (See letter dated May 6, 1987, from Mark Pittner, Ph.D.) In the absence of evidence that the Fulton County program would be appropriate, the only legally appropriate program for Chance is the Toledo Autistic Society's program: a program which provides continuity of Chance's regular academic year IEP, and of staff and environment from previous years.

2. Evergreen Local School District is failing to provide Chance Cordrey with a free appropriate public education by refusing to place extended school year services in Chance's IEP in Evergreen Local School District that the extended school year portion of the IEP will not be subject to the maintenance of placement provisions of 20 U.S.C. Section 1415 and Chapter 3323 of the Ohio Revised Code. The parents agree that IEP goals and placement are subject to annual review; however, the "stay-put" mandate applies to all aspects of a child's special education program. There is no basis for the exclusion of extended school year programming from the stay-put mandate.

3. Evergreen Local School District failed to abide by the procedural requirements of 20 U.S.C. Section 1415, Chapter 3323 and regulations promulgated thereto by conducting an illegal IEP meeting on May 5. First, none of Chance's current or future teachers were present. Second, Evergreen's

decision to place Chance in the Fulton County program was not based upon a team decision; instead, the selection was presented by Evergreen's counsel as being appropriate. Furthermore, there was no reference made by Evergreen to Chance's IEP goals and objectives in determining the placement. Although Evergreen's counsel indicated that portions of Dr. Pittner's report were not clear to him, no attempt was made by Evergreen to either invite Dr. Pittner to the IEP meeting or discuss the report by telephone prior to the meeting.

EVIDENCE, TESTIMONY, RECORDS

Submitted with this document:

A. Hearing transcript (parties have copies)

B. Exhibits (parties have copies)

STATEMENT OF THE CASE

This matter is brought pursuant to Ohio Revised Code 3323.05(E), and Ohio Administrative Code 3301-51-02(6)(1)(b). The Hearing is required by Federal Law P.L. 94-142, Section 615(b); 34 C.F.R. 300.504(a).

Petitioner is Chance Cordrey, by and through his parents. The Respondent is the Evergreen Local School District by and through is (sic) Superintendent.

Both parties were represented by legal counsel.

Specific issues were anticipated in the hearing request. (See Ex. 49). In addition, a Motion for Summary Judgment as well as the hearing itself reshaped the issues for consideration.

The net considerations appeared to be the placement of Extended School Year (ESY) services on Petitioner's IEP and the appropriations of available providers of alternatives.

The record consists of a transcript in 5 volumes totalling 893 pages, together with Petitioner's Exhibits 1-70 and Respondent's

Exhibits A-G. Post Hearing Briefs were filed by Petitioner and Respondent on or about December 31, 1987. The parties have waived the time limitations of O.A.C. 3301-51-02 (6)(5).

FINDINGS OF FACT

1. Robert and Karen Cordrey are the parents of Chance Cordrey. Chance is a twelve year-old handicapped child as defined by 20 U.S.C. Section 1401(a)(1) and Ohio statutes and rules. (Stipulation #1, dated September 22, 1987).

2. The Cordreys reside in the Evergreen Local School District in Fulton County, Ohio. Evergreen is required to provided (sic) Chance with a free, appropriate public education and related services. (Stipulation #2, dated September 22, 1987).

3. Based on prior testing and an evaluation in April of 1987, Chance's current intellectual functioning has been determined to fall near the 18-month age level with speech and fine motor skills falling well below this and some skills above this level. (Exhibit 46, Dr. Pittner's report, April, 1987). Chance has pervasive severe to profound delays in all areas including cognitive functioning, speech and language, social adaptive and social emotional skills (Tr. 227 et seq.) and problems generalizing skills from one situation to another (Tr. 233-34). Chance also exhibits autistic-like behaviors which were noted in evaluations at least as early as 1979 (Tr. 221) and are still evident in most recent testing. (Exhibit 46, Dr. Pittner's report, April, 1987; Tr. 224-225, 226, 227, 228).

4. For the 1981-82 school year, Evergreen and the Cordreys considered placement of Chance into the Fulton County Board of Mental Retardation and Developmental Disabilities (hereinafter FCBMR/DD) but agreed to place Chance in the severe multiple impairments (now Multi-handicapped, hereinafter MH) class located at Glendale-Feilbach School in the Toledo Public Schools, Lucas County, Ohio. This was

Chance's first placement in the public education system. (Stipulation #3, September 22, 1987).

5. Since his placement in 1981, Evergreen and the Cordreys have consented to Chance's continued placement in the MH class in Toledo. (Stipulation #4, September 22, 1987).

6. Chance was first enrolled in a summer program in 1980. He attended the FCBMR/DD summer program in 1980 and 1981. The Cordreys sought summer programming for Chance because they felt it was necessary for Chance to maintain learned skills through the summer to enable him to progress from year to year. (Tr. 145). This was based on observations that Chance would regress over even short breaks from school (holidays, weekends, etc.) causing a decrease in listening and an increase in self-stimulatory behaviors, balancing, withdrawal and other inappropriate behaviors. (Tr. 81-82, 145-6, 294, 288).

7. In the summer of 1982, the Cordreys enrolled Chance in a summer education program operated by the Toledo Autistic Society (hereinafter TAS), a not-for-profit private agency located in Lucas County, Ohio. The MH class in Toledo did not operate during during (sic) the summer. Evergreen was not requested nor did it pay the cost of the TAS program in 1982. (Stipulation #5, September 22, 1987).

8. Since placement in the TAS program, Chance has been noted to have generally maintained his skills from one year to the next in most areas. (Tr. 245, 430-448). The TAS program followed the IEP. (Tr. 70).

9. In or around May, 1984, The (sic) Cordreys made a request to Joseph DeRose, Superintendent of Evergreen, that Evergreen provide an extended school year (hereinafter ESY) program for Chance at the TAS program. (Tr. 72-73).

10. Evergreen has no established criteria for determining the need for ESY services (Tr. 144, 216-217, 249, 353, 368,

394, 456). In fact, the only summer educational services in Fulton County were for hearing impaired children. (Tr. 744 et seq.). These children were not required to exhibit regression. The only criterion for participation by these children was parental desire for their children to receive summer services. (Tr. 748). There were no ESY services placed on the IEPs (individual education programs) of any multi-handicapped children in Fulton County. (Tr. 318).

11. On July 15, 1984, the Evergreen Board of Education determined that Chance should be provided an extended school year program but decided that the service should be provided at the FCBMR/DD summer program. (Stipulation #7, September 22, 1987). There is no cost for the program through the county board. (Tr. 748).

12. On November 14, 1985, an IEP meeting was held for Chance. The parties were unable to reach an agreement regarding summer services. (Stipulation #8, September 22, 1987). The disagreement centered on the propriety of ESY and upon which of two available programs were "appropriate" for Chance, with the Cordreys preferring the TAS program and Evergreen preferring the county board program. In an effort to resolve this dispute without litigation, the parties entered into an Agreement and Mutual Release in May of 1986. (Exhibit 40). The Agreement provided the following:

    A) The board would reimburse the Cordreys for the costs of Chance's attendance at the TAS program for the summer of 1985 and for the summer of 1986. This was based on agreement of the parties of Chance's need for ESY in both 1985 and 1986.

    B) The parties, in an effort to establish a basis for determining the need for ESY for 1987 and thereafter, agreed to an evaluation for Chance commencing no later than February 28, 1987, to determine the need for ESY for

1987, the extent of such services if needed, and the types of programs that would be appropriate to serve these needs.

C) The parties agreed further that an IEP conference would be held on or about April 7, 1987, to discuss the results of that evaluation.

13. Pursuant to the Agreement, the parties selected Mark S. Pittner, Ph.D., to conduct an evaluation of Chance. The evaluation report was completed in April, 1987. (Stipulation #10, September 22, 1987).

14. It was the opinion of Dr. Pittner that:

A) The risks of not providing ESY to Chance were unacceptable and that he could benefit greatly from ESY services. The minimum service necessary to maintain Chance's skills would require a summer program that was 8 to 10 weeks, 5 days a week, and 5 to 6 hours per day. (Tr. 248, 255-6).

B) During Chance's ESY, The (sic) IEP should be followed as closely as possible. (Tr. 255-56).

C) The TAS program was an appropriate placement for Chance and was recommended based on its proven advantages. Dr. Pittner was unable to determine the appropriateness of the county board program as it was a program in revision and specific critical aspects of the program were indeterminable at the time of evaluation. (Exhibit 46, Tr. 248).

15. During his testimony, Dr. Pittner stated that Chance also needs one-to-one attention on a frequent basis in order to demonstrate his skills. (Tr. 231-32, 247). This was confirmed by Chance's teacher. (Tr. 458-9).

16. As per the Agreement and Mutual Release, the parties met on May 5, 1987, to discuss Dr. Pittner's evaluation. The

parents and their counsel understood this to be the IEP meeting required under the Agreement to be held on or about April 7, 1987. (Tr. 129). No IEP meeting was held prior to the May, 1987, meeting and this was the first meeting of the parties following completion of the evaluation. Chance's IEP was not referred to during the meeting, nor were goals and objectives established at this meeting. (Tr. 129-130).

17. In attendance at the meeting were: the Cordreys, the Superintendent of Evergreen Schools, the psychologist for the Fulton County Board of Education, a psychology intern, and counsel for the parties. (Stipulation #11, September 22, 1987). The classroom teacher and Dr. Pittner were not invited to attend. (Tr. 251, 449). There were no representatives from the county board summer program. (Tr. 128-129). Evergreen did not request their attendance. (Tr. 503).

18. During the meeting, the parties agreed that Chance should receive ESY for the summer of 1987 based on Dr. Pittner's determination that the risk of regression in the absence of such summer programming was unacceptable for Chance. (Stipulation #12, September 22, 1987).

19. Evergreen determined further during this meeting that these ESY services for Chance should be provided through the county board's summer program. The parents disagreed that Dr. Pittner's report supported that position. (Stipulation #13, September 22, 1987). The board of education did not understand the May 5, 1987, meeting as an IEP, but instead as an informal follow-up on Dr. Pittner's report. The only action was to resolve the immediate conflict over pending summer placement.

20. The county board program's length and composition has varied over the term of its existence. (Tr. 553). At the time of the May 5, 1987, meeting, the components of the 1987 summer program were not certain. There was no confirma-

tion that the teachers in the county program would be certified; that the IEPs of the participating students would be followed; that sufficient numbers of classroom aides would be provided; the length of the program, including hours per day, days per week, and weeks per summer session. (Tr. 558). Further, as of December of 1987, the components of the 1988 session were undeterminable and undecided. (Tr. 555-559). No one from Evergreen consulted with the county board staff to determine if Chance's needs could be met there. (Tr. 504).

21. Based upon his discussions with Randy Stull-Barnes (Tr. 293f), he determined that the Fulton County MR/DD program would, if implemented as then intended, be quite comparable to the TAS program. Mrs. Cordrey served on the committee that developed the summer program for the Board of MR/DD, and Mr. Cordrey is a member of its Board of Directors. (Tr. 1640). While that program had not been finally approved by the Board prior to Mr. Pittner's report, it was approved on April 20, 1987 (Tr. 492), and was substantially identical to what had been anticipated in the discussions with Mr. Pittner. (Tr. 519). That program, if provided, would have followed Chance's IEP (Tr. 520-522), and could have fulfilled its goals. (Tr. 4920). The Toledo Autistic Society program would have no advantages in Mr. Stull-Barnes' opinion unless it provided a more familiar teacher (Tr. 526); and even that would be regarded by Mr. Zake as a disadvantage in that Chance needs an opportunity to learn to interact with different individuals. (Tr. 7220).

22. Mr. Zake stated at Tr. 727, "If Chance needs extended school year programming, it could possibly consist of consultative services to the family so that Chance could continue to work on priority type skills like his communication skills, like his eating skills."

23. Although it was stipulated that there was a need for ESY for 1985 and 1986 and Dr. Pittner's report indicated an unacceptable risk without ESY for 1987, Evergreen would place ESY on Chance's IEP only if the Cordreys agreed to exclude ESY from the maintenance of placement provision of 20 U.S.C. Section 1415 and O.R.C. Chapter 3323. (Tr. 131; Stipulation #14, September 22, 1987). Evergreen was concerned that it would incur a continuing financial obligation to provide ESY if it were not excluded from the status quo provision. (Tr. 823, 845). The parents refused to waive the status quo provision.

24. On May 11, 1987, the Cordreys requested an impartial due process hearing.

FINDINGS OF FACT RELATING TO DUE PROCESS

1. Both parties waived the time limits contained in O.A.C. Section 3301-51-02(G)(5).

2. At or before the impartial hearing, the Petitioner's parents were informed that they had the following rights to:

   (a) be accompanied and advised by counsel and by individuals with special knowledge or training in the problems of handicapped children;

   (b) present evidence and confront, cross-examine and compel the attendance of witnesses whose testimony is relevant, necessary and material;

   (c) prohibit the introduction of evidence at the hearing that had not been disclosed to that party at least five days before the hearing;

   (d) obtain a written or electronic verbatim record of the hearing;

   (e) obtain written findings of fact and decisions;

   (f) have access to educational records;

(g) be informed of how to appeal decisions;

(h) have the Petitioner who is the subject of the hearing present;

(i) have the hearing open to the public; and

(j) receive notices in written language understandable to the public and provided in the native language of the parent.

3. The Petitioner and Respondent were notified of the date, time and location of the hearing and their rights relative to the hearing.

4. The parties were notified of their right to subpoena witnesses and witnesses were subpoenaed at the request of both Petitioner and Respondent.

5. A pre-hearing disclosure conference between the parties was held at least five days prior to the hearing and witness lists and exhibits were disclosed. One exhibit was offered at the hearing that was not disclosed at the pre-hearing conference, but the parties were aware of and had reviewed this document before the disclosure conference.

6. At the hearing the parties were provided an opportunity to present evidence and confront and cross-examine witnesses.

7. The parties requested by Stipulation additional time beyond the 45-day limit required for determining due process hearing issues and the request was granted by the hearing officer.

8. The parties were advised of their rights to appeal.

9. The parents were given an opportunity to select attorneys acceptable as impartial hearing officers from a list provided by the school district.

10. The parents received, read and understood the written notification of hearing.

11. The parents understood the specifics of parents' rights.

12. The parents were given an opportunity to receive the parents' rights brochure, parents' pamphlet, federal law and regulations, state law, and rules for the education of handicapped children.

CONCLUSIONS OF LAW

Based on the evidence and testimony presented and the subsequent Findings of Fact, the Impartial Hearing Officer has made the following conclusions of law:

1. The due process requirements set forth in 20 U.S.C. Section 1401 *et seq.*; Title 34, Code of Federal Regulations, Part 300; Chapter 3323, Ohio Revised Code; and Chapter 3301-51-02, Ohio Administrative Code, have been followed in this proceeding or knowingly waived by Petitioner and Respondent and Petitioner has been granted due process.

2. Chance Cordrey is a handicapped child entitled to a free appropriate education which includes a special education program designed to meet his unique educational and emotional needs.

3. The Petitioners have the burden of going forward with evidence to indicate a probable violation of due process by Evergreen in making a placement decision for Chance. The Petitioners have met this burden. The Respondents have the burden of persuasion in showing that they operated in a legal manner. The Respondents have not met this burden of persuasion.

4. ESY is a necessary part of Chance's special education to allow him to benefit from his schooling during the year. The ESY program must follow Chance's IEP as closely as possible to meet this need.

5. If ESY is not provided for Chance, there is an unacceptable risk to Chance's maintenance of academic progress, as well as behavioral and attending skills during the regular school year.

6. Evergreen failed to comply with the procedural requirements of the EHA. Federal and state law require a multifactored evaluation for determination of an appropriate IEP and placement. O.A.C. 3301-51-02(D). The decision to place a child into a special education program must be made during the IEP meeting by a group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. O.A.C. 3301-51-02(E)(l). The IEP participants must include the child's teacher and the child's parents. O.A.C. 3301-51-02(E)(l)(a)(ii) and (iii). The school district is responsible for developing and implementing written procedures which require placement decisions to be made in accordance with these procedures, including the determination of placement decisions in conformance with a properly developed IEP.

7. Evergreen may have deviated from the procedural mandates of the law by making a placement decision in the absence of required IEP team members. There appeared to be confusion re: the May 5, 1987, meeting and its purpose. Although an IEP meeting did not occur, such was not an intentional violation by Evergreen. Attendance of the child's teacher is required under Ohio and federal law: the teacher and others were not in attendance. O.A.C. 3301-51-01(E)(l)(a)(ii); 34 C.F.R. 300.344(a)(2); Case No. SE-25-83, 1983-84 EHLR 505:113 (SEA Illinois 1983).

8. Evergreen appeared to have knowledge and was sensitive to IEP goals and objectives. Ohio and federal law require that educational placements be determined in accordance with the child's IEP. O.A.C. 3301-51-02(E)(l)(d)(iv); 34 CFR 300.533(a)(4), 34 CFR 300.552; 45 CFR 104.33(b); Boone

County R-IV School District, OCR/Complaint LOFs, EHLR 257:103 (1980).

9. During the May 5 meeting, Evergreen made no reference to Chance's IEP in determining placement at MR/DD. Despite Dr. Pittner's (and Mrs. Jasco's subsequent) recommendations to follow the IEP, there was no discussion as to whether MR/DD could address the IEP goals and objectives. The only information available at the meeting was contained in Dr. Pittner's report that the MR/DD program generally hoped to follow children's IEPs. There was no determination made that MR/DD could in fact carry out the specific requirements of Chance's IEP.

10. The county program was in revision at the time the decision to place Chance was made. However, there has been some showing made that this program could meet Chance's goals and objectives. The program included a great deal of unstructured recreational time in the past. In contrast, it has been consistently determined that to maintain skills, Chance needs structured, one-on-one intervention. (Tr. 231-32, 247). The county program has not in the past, but could in the future, assure the program will have the services necessary to meet Chance's needs. The identification and assurances required need to be provided in sufficient time for one in Chance's circumstances to make a reasonable election participate.

11. The matter of ESY has never been the subject of an IEP meeting.

12. Evergreen had no established criteria for determining the need for ESY services. Developing such criteria is essential for the protection of the children involved as well as the school district.

13. The occurrence of or potential for regression is just one of the factors Evergreen was required by law to consider. *Lee vs. Thompson*, No. 80-0418 slip op. — (D.H.I. April 8,

1983), 1982-83 EHLR Dec., 554:429). Other factors to be considered in making this determination include the nature and severity of the child's developmental delay, the child's difficulty with generalization of skills, whether the child has made sufficient progress over the school year and the assessments, observations, and recommendations of the parents, evaluators and those individuals working with the child.

ORDER

WHEREFORE, the order of the hearing officer is as follows :

1. Chance was entitled to an ESY in 1987 and since the MR/DD program was not sufficiently defined at the time this dispute arose, Evergreen must reimburse the Cordreys for the cost of Chance's attendance at TAS for 1987;

2. Chance is entitled to an ESY in 1988 which includes the following components:

   a. A minimum of 8 to 10 weeks of educational programming over the summer, including 5 days per week and a minimum of 5 and 1/2 hours per day;

   b. A program which follows Chance's entire IEP as it exists during the regular school year;

   c. One-to-one instruction not required unless other ratios are determined to be wholly ineffective;

   d. Transportation and all other related services received during the regular school year;

3. By no later than March 1, 1988, Evergreen must draft an IEP which includes all of the components listed in #2 above and said services will be subject to the status quo provision if disputes arise in the future;

4. Placement will be at the MR/DD Fulton county program unless the parties agree otherwise based upon a demonstration

that the Fulton County Program is substantially deficient and not able to meet the needs as outlined in #2 above;

5. Consultation between Chance's regular school year teacher and summer school teacher will occur at least at the end and beginning of the regular school year. The purpose of those consultations will be to compare data regarding Chance's progress and to coordinate teaching efforts.

6. Respondent is required to develop an appropriate process for evaluating the need for ESY which comports with the findings of law set forth above.

IT IS SO ORDERED.

DATED: February 5, 1988
By: Jerry W. Lee
Impartial Hearing Officer

NOTICE OF OPPORTUNITY FOR APPEAL AND RIGHTS FOLLOWING THE HEARING

You may request a verbatim transcript of the hearing.

If you are dissatisfied with the decision and findings rendered in the Impartial Due Process Hearing, you may request a state level

review by contacting Ohio's State Board of Education through:

State Superintendent of Public Instruction
Executive Offices-Room 808
Ohio Department Building
65 South Front Street
Columbus, OH 43215
Phone: (614) 466-3304

If you are dissatisfied with the final order of the State of Education, you may appeal to the common pleas court in the county of the child's school district of residence or the federal district court of competent jurisdiction.

DATED: February 5, 1988
By: Jerry W. Lee
Impartial Hearing Officer

(2)

Supreme Court, U.S.
FILED
MAR 1 1991
OFFICE OF THE CLERK

No. 90-1248

IN THE

Supreme Court of the United States

October Term, 1990

CHANCE CORDREY, a minor; and KAREN AND ROBERT CORDREY, on behalf of their minor son,
Petitioners,

vs.

R. J. EUCKERT, Superintendent; GREGG SIMON, MARIANN GLECKLER, CAROL KLECK, RICHARD NAPIERALA, and LOREN PENNINGTON, in their capacities as members of the Evergreen Board of Education; EVERGREEN LOCAL SCHOOL DISTRICT; EVERGREEN BOARD OF EDUCATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Sixth Circuit's evaluation of a handicapped child's need for extended school year services through the use of a strict "regression/recoupment" standard conflicts with this Court's decision in *Hendrick Hudson Board of Education v. Rowley,* 458 U.S. 176 (1982) and Congressional intent under the Education of the Handicapped Act that each handicapped child receive an individualized "free appropriate public education."

2. Whether the Sixth Circuit's application of traditional procedural notions by allocating the burden of proof to the parents and by creating a harmless error exception to a school district's obligation to comply with procedural safeguards of the Education of the Handicapped Act is contrary to this Court's rulings and Congress' remedial intent.

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No. 90-1248

IN THE

Supreme Court of the United States

October Term, 1990

CHANCE CORDREY, a minor; and KAREN AND ROBERT CORDREY, on behalf of their minor son,
Petitioners,

vs.

R. J. EUCKERT, Superintendent; GREGG SIMON, MARIANN GLECKLER, CAROL KLECK, RICHARD NAPIERALA, and LOREN PENNINGTON, in their capacities as members of the Evergreen Board of Education; EVERGREEN LOCAL SCHOOL DISTRICT; EVERGREEN BOARD OF EDUCATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Respondents do not contest the Statement of Opinions of the United States District Court for the Northern District of Ohio and of the United States Court of Appeals for the Sixth Circuit set forth in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Respondents do not contest the Statement of Jurisdictional Grounds set forth in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The Respondents agree that the statutory provisions involved are 20 U.S.C. §§1400 *et seq.*

RESTATEMENT OF THE CASE

Chance Cordrey is a multiply-handicapped student who is profoundly retarded and engages in some autistic-like behaviors (Tr. 27, 683). Chance resides with his parents in the Evergreen Local School District (Evergreen) in Fulton County, Ohio. Since 1981, he has been placed in multi-handicapped classes in the Toledo Public Schools and in Fulton County pursuant to his individualized education program (IEP).[1]

Extended School Year (ESY) services have never been included in Chance's IEP (Tr. 161). Chance has had a behavior plan since 1985 which is used successfully at home, as well as in the schools (Tr. 32, 119-120, 148-149).

---

[1] As used in the Education of the Handicapped Act:

> The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and whenever appropriate, such child, which statement shall include—
>
> (A) a statement of the present levels of educational performance of such child,
>
> (B) a statement of annual goals, including short-term instructional objectives,
>
> (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,
>
> (D) the projected date for initiation and anticipated duration of such services, and
>
> (E) appropriate objective criteria and evaulation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. §1401(a)(19).

Chance's parents began enrolling him in summer programs in 1980 (Tr. 69), and since 1982 have enrolled him in a summer program operated by the Toledo Autistic Society (TAS) (Tr. 70). The only effect noted or anticipated from the absence of summer programming for Chance is a temporary increase in inappropriate behaviors (Tr. 70, 146).

Despite some inconsistency in behaviors and levels of performance throughout the school year (Tr. 53, 152, 461), Chance has experienced slow, steady progress (Tr. 152, 460-461).

After Chance attended two summers in the TAS program, the Cordreys asked Evergreen to pay for that program as part of Chance's IEP. In November, 1985, an IEP meeting was held, but the parties were unable to reach an agreement regarding summer services (Stipulation 8). Instead, in May, 1986, the parties negotiated an "Agreement and Mutual Release" (JA. 42-46). The Agreement, *inter alia*, provided that the parties would select a psychologist to evaluate Chance to determine whether he needed ESY services in 1987 and, if such need were shown to exist, what program or programs would be appropriate (JA. 45, ¶5). Two programs were to be considered, a public program offered by the Fulton County Board of Mental Retardation and Development Disabilities and the private program operated by TAS.

The parties eventually agreed that Mark Pittner would conduct the evaluation (Tr. 181, 208, 327, 772). Dr. Pittner completed his evaluation in April, 1987. Dr. Pittner reported that the program offered by the Fulton County Board of Mental Retardation and Development Disabilities would be comparable to the TAS program desired by the Cordreys (JA. 52-53).

Dr. Pittner clearly misunderstood the parameters of his evaluation. He testified that it seemed to him that the parties "were making the preconceived idea that what they really wanted . . . to address was which one [ESY program] was more appropriate, not if he should have it" (Tr. 283).

Dr. Pittner concluded "that it was impossible to empirically or psychometrically assess whether or not a *need* for an extended school year was necessary for Chance" (JA. 48). He stated that Chance could benefit from an ESY program, and that "the risks of not being granted this opportunity appear unacceptable" (JA. 53), despite the fact that Chance continued to make steady, gradual improvement (Tr. 223, 226).

Dr. Pittner did not consult with Jerry Zake, whom he knew to be Chance's current school psychologist and the person who had conducted Chance's most recent multifactored evaluation (Tr. 284). Dr. Pittner did interview Chance's teacher, Judy Jacso (Tr. 234). Ms. Jacso charted the progress of Chance and each of the other students in her unit throughout the year, and kept detailed records of their progress or lack thereof (Tr. 460, 478-479). Thus, data existed that would have permitted comparison of Chance's progress or regression/recoupment with that of other students. However, Dr. Pittner did not request available data, nor make any attempt to compare Chance's experience with that of other children (Tr. 293). Dr. Pittner also acknowledged that not all profoundly retarded children (Tr. 276, 291), nor all autistic children[2] (Tr. 291), need ESY services.

[2] Mrs. Cordrey believes Chance is an autistic child (Tr. 71).

Each of the psychologists who tested and evaluated Chance over the years, Dr. Pittner (Tr. 290-291), Ned Pakosz (Tr. 683-684), and Jerry Zake (Tr. 704-705), regarded Chance to be making reasonable progress in view of his handicaps.[3]

On May 5, 1987, the parties met to discuss the results of Dr. Pittner's evaluation. The Cordreys understood this meeting to be an IEP meeting. Respondents understood it to be an informal meeting for the parents and Evergreen to discuss their understanding of Dr. Pittner's report (Tr. 778, 804). Neither Chance's teacher nor Dr. Pittner were present at the meeting. The District Court held that this was an IEP meeting, but that no IEP was developed at the meeting.

Notwithstanding the absence of any determination that ESY services were necessary for Chance to benefit from his education, Evergreen offered to make the County program available to Chance (Tr. 706, 779). Absent a demonstrated need for the services, Evergreen conditioned its offer upon an agreement by the Cordreys to exclude the program from the "stay-put" provision of the Education of the Handicapped Act, 20 U.S.C. §1415(e)(3).[4]

---

[3] At the time of his impartial due process hearing, Chance functioned at the developmental level of a 17-21 month-old child (Tr. 704). Evidence at the hearing was that, given his developmental level a decade earlier, and assuming he had been provided appropriate educational programming with reasonable goals and objectives, Chance would have been expected to function at that level (Tr. 683-684).

[4] 20 U.S.C. §1415(e)(3) states:

> During the pendency of any proceedings conducted pursuant to this section, *unless the State or local educational agency and the parents or guardian otherwise agree,* the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed. (Emphasis addded.)

Following that discussion, the parents objected that the meeting was not a properly convened IEP meeting because Chance's teacher and Dr. Pittner were not present. Evergreen immediately offered to recess the meeting and reconvene with those individuals present (Tr. 804). The Cordreys and their counsel refused that offer, and left the meeting.[5] The entire meeting had lasted only a few minutes. Six days later, on May 11, 1987, the Cordreys requested an impartial due process hearing.

An impartial due process hearing was conducted. The Impartial Hearing Officer (IHO) concluded that if ESY services were not provided for Chance, there was an unacceptable risk to Chance's maintenance of academic progress, as well as behavioral and attending skills during the regular school year (Conclusion of Law ¶5). The IHO ordered that Chance receive ESY services through the County program unless the parties agreed that the County program could not meet Chance's needs.

The State Level Review Officer reversed, concluding that the parents had not sustained their burden of proving that Chance needed ESY services in order to benefit from his education.

The Cordreys appealed that decision to the United States District Court for the Northern District of Ohio, Western Division. The District Court held that Evergreen did not violate the procedural mandates of the EHA and that the Cordreys failed to prove that Chance would suffer significant regression of his progress toward self-sufficiency without a summer program.

The Cordreys appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit which affirmed.

[5] After the parties met on May 5, 1987, the Cordreys solicited a letter from Dr. Pittner in which he concluded that the TAS program desired by the Cordreys was preferable to the County program (JA. 54).

REASONS WHY THE PETITION SEEKING DISCRETIONARY REVIEW SHOULD BE DENIED

I. THE SIXTH CIRCUIT'S USE OF A REGRESSION/RECOUPMENT STANDARD FOR DETERMINING A HANDICAPPED STUDENT'S ENTITLEMENT TO EXTENDED SCHOOL YEAR SERVICES (A) IS SUPPORTED BY THE STATUTE, (B) COMPORTS WITH THE REASONING OF THIS COURT, AND (C) IS IN ACCORD WITH DECISIONS AMONG THE CIRCUITS.

A. The Education Of The Handicapped Act

The Education of the Handicapped Act assures handicapped children the right to a "free appropriate public education", which is designed to meet the needs of each handicapped child by means of an individualized education program (IEP), 20 U.S.C. §§1401(a)(18), 1412(1).[6]

---

[6] "In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

> (1) The state has in effect a policy that assures all handicapped children the right to a free appropriate public education."

20 U.S.C. §1412(1).

"The term 'free appropriate education' means special education and related services that—

> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

20 U.S.C. §1401(a)(18).

Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 189, 200-201 (1982), construed the Act's mandate to provide a free appropriate public education to require personalized instruction that offers the child a "basic floor of opportunity" consisting of "access to specialized instruction and related services that are individually designed to provide educational benefit to the handicapped child."[7] The Court specifically declined to establish any one substantive test for determining the adequacy of educational benefits conferred upon all children. *Id.* at 202. The Court thus recognized that determining whether a particular child has received a free appropriate public education requires a case-by-case analysis of the facts and circumstances.

B. Extended School Year Services

The courts in several circuits have now addressed the provision of ESY services. The early cases overturned policies which precluded all handicapped students from receiving ESY services. See, *e.g.*, *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983); *Crawford v. Pittman*, 708 F.2d 1028 (5th

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[7] 20 U.S.C. §1401(a)(16) and (17) define the pertinent terms as follows:

> (16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.
>
> (17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Cir. 1983); *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979) *aff'd sub nom. Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980).

More recently, the appellate courts have been asked to review the standard for determining whether a particular handicapped child is entitled to ESY services as a part of the child's free appropriate public education. This issue has now been addressed by the Fifth, Sixth and Tenth Circuits.

Contrary to Petitioners' submission, there is not confusion among these courts regarding the appropriate standard. Each of the circuits has looked first at whether the child suffers regression of attained skills and, if so, whether the child can recoup those losses within a reasonable time.

The Sixth Circuit has twice addressed this issue. In *Rettig v. Kent City School District*, 720 F.2d 463, 466 (6th Cir. 1983), the court briefly stated that a summer program was "not necessary to permit [the child] to benefit from his instruction". It thus affirmed the District Court which had stated that "a child is entitled to an extended school year if it would not be merely 'beneficial' but ... a necessary component of an appropriate education for the child", and particularly that such service "would be appropriate if it would prevent significant regression of skills or knowledge retained by [the child] so as to seriously affect his progress toward self-sufficiency." *Rettig v. Kent City School District*, 539 F. Supp. 768, 778-779 (N.D. Ohio 1981), *aff'd in part, vacated on other grounds*, 720 F.2d 463.

Relying upon *Rowley,* 458 U.S. at 199, 200, the Sixth Circuit has stated that a school district is not required to maximize a handicapped child's potential, but instead must provide "some educational benefit" to the child. *Cordrey v. Euckert,* 917 F.2d 1460, 1473 (6th Cir. 1990).

In *Cordrey,* the Sixth Circuit relied upon its earlier decision in *Rettig* that a party desiring ESY services must show that these are "necessary to permit [the child] to benefit from his instruction". *Cordrey,* 917 F.2d at 1473 citing *Rettig,* 720 F.2d at 466. Elaborating upon this standard, the Sixth Circuit herein stated:

> The best rule is that which recognizes that the school district has no purely custodial duty to provide for handicapped children while similar provision is not made for others. We therefore begin with the proposition that providing an ESY is the exception and not the rule under the regulatory scheme. Given those policy considerations, therefore, it is incumbent upon those proposing an ESY for inclusion in the child's IEP to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recoupable regression.
>
> . . . If the child benefits meaningfully within his potential from instruction under a proper IEP over a regular school year, then ESY services may not be required under the Act unless "the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an [ESY]." *Alamo Heights,* 790 F.2d at 1158.

Cordrey, 917 F.2d at 1473. *Cordrey,* thus also followed the Fifth Circuit's earlier ruling regarding provision of ESY services to handicapped children. *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153, 1158 (5th Cir. 1986).

The *Alamo Heights* standard has also recently been adopted by the Tenth Circuit in *Johnson v. Independent School District No. 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990). However, *Johnson* also indicated that the regression/recoupment analysis is not the only viable measure to determine the necessity for ESY services. It noted a list of possible factors for consideration, but stated that it was not intended that each element would impact planning for each child's IEP. *Johnson, supra*, at n.9. The list of possible factors included, *inter alia*, the degree of regression, recoupment time, the degree of impairment, the child's rate of progress, and the child's behavioral and physical problems.

Some of these factors are also included in the five-point test proposed by Petitioners in reliance upon an unpublished decision in *Lee v. Thompson*, 1982-83 Educ. Handicapped L. Rep. (CRR Publishing), 554: 429 (D. Haw. 1983). In addition to regression and recoupment, *Lee* considered the nature and severity of the child's handicap, and the areas of learning crucial to progress towards self-sufficiency when determining whether a child was entitled to ESY services.

The Sixth Circuit has also recognized these factors as potential considerations in determining whether ESY is necessary for a particular child. The court stated that where empirical data regarding a child's regression and recoupment is unavailable, a child's need for ESY services may be proven by expert opinion based upon a professional assessment of the individual child which would take into account many of the factors mentioned in *Lee* and *Johnson*. *Cordrey*, 917 F.2d at 1472. Thus, *Cordrey* noted that its analysis does not differ significantly from either *Lee* or *Alamo Heights*. *Id.*

In fact, such evidence was clearly in the record of the proceedings in this matter. There was testimony regarding Chance's regression and his ability to recoup losses within a reasonable time (Tr. 416-419, 421, 430-431, 433-436, 471). There was testimony regarding the expectations for regression and recoupment for a child with Chance's impairments (Tr. 684-685, 694, 739). There was evidence that Chance functions at a level to be expected for one with his handicapping conditions (Tr. 683-684, 704). There was evidence that despite annual breaks in his programming, Chance has made and continues to make reasonable progress toward achievement of his educational goals (Tr. 290-291, 683-684, 704-705).

In summary, the courts below were presented with a set of facts and circumstances. Analysis of the record herein resulted in evidentiary findings, specifically, that Chance has received a free appropriate public education which has conferred some meaningful educational benefit, and that ESY services are not necessary for Chance to meaningfully benefit from his individual educational program. This analysis and result comports with the requirements of the Act, as interpreted by this Court. Moreover, there is not confusion among the circuits regarding the appropriate standard to determine when ESY services are necessary for a child to benefit from his education. Thus, this case does not warrant this Court's exercise of its powers of supervision with respect to this issue.

II. THE SIXTH CIRCUIT'S APPLICATION OF TRADITIONAL DEFENSES AND ITS ALLOCATION OF THE BURDEN OF PROOF AMONG PARTIES IN EDUCATION OF THE HANDICAPPED ACT CASES COMPORT WITH THE DECISIONS OF OTHER CIRCUITS AND PROVIDE NO BASIS FOR SUPERVISION BY THIS COURT.

Petitioners have focused upon two procedural issues. First, the court allocated the burden of proof to the parents as the party proposing a change in the services provided under Chance's IEP. *Cordrey,* 917 F.2d at 1469. The Sixth Circuit's decision on this issue accords with the decisions of other circuits.

Second, Petitioners disagree with the Sixth Circuit's rulings regarding alleged procedural errors. In the proceedings below, Petitioners alleged that several procedural errors had occurred. The courts concluded that the alleged procedural errors had not occurred, or that any error was harmless, correctable, or did not prejudice Petitioners. Despite the absence of any statutory language limiting the ordinary discretion of courts to weigh procedural matters, Petitioners claim that the court's action was contrary to the Act. Petitioners also claim that the Sixth Circuit's findings regarding the alleged procedural errors conflict with the findings of other federal courts. However, Respondents submit that these decisions can be harmonized.

A. The Sixth Circuit Properly Allocated The Burden Of Proof To The Parents As The Party Proposing To Change The IEP.

In *Cordrey,* the court relied upon its earlier decision in *Doe v. Defendant I,* 898 F.2d 1186 (6th Cir. 1990), and held that Petitioners, as the party challenging the terms

of Chance's IEP, should bear the burden of proving that the educational placement established by the IEP was not appropriate. 917 F.2d at 1469.

In reaching that conclusion, the Sixth Circuit cited *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part sub nom., Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984) ("because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate"). *Accord, Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986).

Other courts have also allocated the burden of proof in this manner. Citing *Alamo Heights, supra*, and *Tatro, supra*, the Tenth Circuit in *Johnson, supra*, allocated the burden of proof to the parents who proposed to change their daughter's IEP by adding ESY services to her educational program.

Even cases cited by Petitioners follow this reasoning. For example, in *Burger v. Murray*, 612 F. Supp. 545 (N.D.Ga. 1984), the court placed the burden on the school district, the party who sought to change the child's existing placement.

Similarly, in *S-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir. 1984), the court addressed the burden of proof when a school district proposed to expel handicapped students for disciplinary reasons. Disciplinary expulsion is clearly a significant change in educational placement. *Honig v. Doe*, 484 U.S. 305, 325 (1988). Thus, *S-1*, 635 F.2d at 348-349, placed the burden on the school district to raise the issue whether disruptive behavior was a manifestation of the students' handicaps.

Petitioners have asked the Court to undertake review of this case because the highest court of one state has held that school districts should always bear the burden of proof in cases under the Act. Petitioners have alleged that the burden should always be placed upon the school district, claiming that the school is better able to meet that burden. Petitioners imply that imposing this burden on the school district would somehow further the quest for truth about a handicapped child's needs.

However, the Act and its implementing regulations establish procedural safeguards intended to assure parental participation in the education of handicapped children. Thus, parents are afforded the opportunity to participate in IEP meetings where decisions are made regarding the child's educational programming and placement. 34 C.F.R. §300.345(a).[8] Parents are permitted to obtain an "independent evaluation" of the child's needs at school district expense, if the parents disagree with the district's evaluation, and the district fails to prove that its evaluation was appropriate. 34 C.F.R. §300.503(b).[9] Parents must also be permitted "to examine

[8] 34 C.F.R. §300.345(a) states:

> Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
>
> (1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and
>
> (2) Scheduling the meeting at a mutually agreed on time and place.

[9] 34 C.F.R. §300.503(b) states:

> A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under §300.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense.

all relevant records with respect to the identification, evaluation, and educational placement of the child". 20 U.S.C. §1415(b)(1)(A). Parents are similarly afforded the right to inspect and review education records of their children under the Family Educational and Privacy Rights Act. 20 U.S.C. §1232g(a)(1)(A).[10] Both parents and school districts thus have access to relevant information that may be used to determine whether a child has received a free appropriate public education.

As noted by the Sixth Circuit, "nothing in the Act indicates that alleged violations should be treated differently from alleged violations of any other federal statute imposing affirmative obligations on the states and their subsidiaries". *Cordrey,* 917 F.2d at 1466. Accordingly, *Cordrey,* like the decisions of other federal courts, simply follows the traditional allocation of the burden of proof. Petitioners have stated no argument that would compel a different conclusion.

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[10] 20 U.S.C. §1232g(a)(1)(A) states:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the educational records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

B. The Sixth Circuit's Conclusions Regarding Petitioners' Allegations Of Procedural Error Can Be Harmonized With The Decisions Of Other Circuits And Provide No Basis For Review By This Court.

In *Rowley,* this Court noted the importance that Congress attached to parental participation in the education of handicapped children as reflected in procedural safeguards that, *inter alia,* require notice and opportunity for parents to attend IEP meetings where educational placement decisions are made, and permit parents to examine all relevant records with respect to the identification, evaluation, and placement of the child. Thus, *Rowley,* 456 U.S. at 206, stated that Congressional emphasis on participation demonstrated "the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP".

Petitioners instead propose a standard of blind, absolute, and unswerving compliance that elevates procedural form over substantive content of the child's educational program. The Petitioners contend that, upon finding any procedural error, regardless of its nature or its harm, a court should abandon any substantive review of the appropriateness of an IEP. As recognized in *Cordrey,* 917 F.2d at 1466, "[i]n effect, they seek to employ Evergreen's technical violation to transform the administrative review process into an alternative route to obtain an ESY for Chance". Respondents submit that no language in the Act, nor in the prior decisions of this Court, warrants such a result.

Petitioners have identified five alleged procedural errors in this case. Two of these involve a May 5, 1987 meeting. The District Court concluded that this was an

IEP meeting which violated the procedural requirements of the Act because Chance's teacher did not attend, but that no placement decisions were made at the meeting. Instead, the parties discussed their disagreement as to whether Dr. Pittner's evaluation indicated that ESY services were necessary for Chance to benefit from his education. Evergreen suggested placing Chance in the County ESY program. Having interpreted Dr. Pittner's report to state that services would be merely beneficial rather than necessary for Chance, Evergreen conditioned the offer upon a waiver of the "stay-put" provisions of the Act. At that point, Petitioners objected that the meeting was not a proper IEP meeting because of the absence of Dr. Pittner and the teacher. Evergreen immediately offered to convene an IEP meeting with those people present. Petitioners, with benefit of counsel, rejected that offer.

Just as the courts were permitted to find, in the face of conflicting evidence, that the May 5 meeting was an IEP meeting, albeit lacking the presence of necessary individuals, the courts also had the discretion to consider what harm, if any, resulted. In this case, no placement decisions were made. Evergreen immediately offered to correct the alleged error. The courts determined that no harm was done.

Moreover, the courts determined that Petitioners, with knowledge, and benefit of counsel waived any error that might have occurred by unreasonably refusing to schedule another meeting. No provision of the Act, nor any decision of this Court, precludes knowing and voluntary waiver of a procedural error. There is no basis for finding that the courts' conclusions on this issue were clearly erroneous. Accordingly, the courts' conclusions do not warrant review by this Court.

Petitioners also claim that Evergreen committed procedural error by failing to document the Cordreys' refusal to schedule another IEP meeting. Petitioners acknowledged that they explicitly refused to conduct another meeting. Instead, they initiated a due process hearing six days later. Petitioners cannot explain how they were prejudiced by Evergreen's failure to document their refusal. Certainly the lack of documentation did not affect Chance's educational opportunities. As recognized by this Court in *Rowley,* the purpose of the procedural safeguards is to encourage opportunities for parental participation. Petitioners cannot explain how this purpose would be furthered by requiring a school district to document a fact which is not in dispute.

The third alleged procedural error involved Evergreen's conditional offer to place Chance in the County summer program, if the parents agreed to waive application of the "stay-put" provision. 20 U.S.C. §1415(e)(3). That provision is activated when a party alleges a violation of the Act, and initiates administrative and judicial review. It provides that a child will remain in his current educational placement during the pendency of administrative and judicial proceedings, unless the parents and the school district otherwise agree. The Sixth Circuit held that this was not a procedural issue, but instead a substantive issue. Chance's placement is governed by his IEP, and his IEP never included ESY services. The court concluded that there would have been error only if Chance was entitled to ESY services but had been wrongfully denied. *Cordrey,* 917 F.2d at 1468. The court, as discussed earlier, concluded that Chance was not entitled to ESY services. Thus, there was no error when Evergreen conditioned its offer of extra services, beyond its obligations under the Act, upon an exemption from the

"stay-put" provisions. As recognized by the Sixth Circuit, there is nothing in the Act to preclude such an offer. 917 F.2d at 1475.

In their fourth allegation of procedural error, Petitioners claim that Evergreen failed to properly develop an IEP in the face of the parents' refusal to meet. For the first time in their Petition to this Court, the Cordreys seem to be saying that in the face of their own refusal to attend an IEP meeting, the school district should have conducted an IEP meeting without the parents, and should have made a unilateral decision whether to provide Chance with ESY services. This would have put the school district in a "Catch-22". Had the district made a placement decision at a meeting without the parents, the parents would have argued that this was also error. By making their due process request, Petitioners had already put the issue into litigation. At that point, under the Act's "stay-put" provisions, Chance's placement was to remain the same unless the parties could agree on what, if any, ESY services were to be provided. Having already rejected Evergreen's interpretation of Dr. Pittner's report, and Evergreen's offer to provide ESY services through the County program which Dr. Pittner had specifically approved, there was no action remaining for Evergreen to take.

Petitioners also claim that Respondents failed to schedule another IEP meeting until forced to do so under the threat of impending litigation. The record clearly refutes this claim. Instead, the record demonstrates that the November, 1987 IEP meeting was planned a year in advance, long before Petitioners' due process request was even initiated.

As noted by the Sixth Circuit, Chance's IEP for the 1986-1987 school year (JA. 55) was prepared at an IEP meeting in November, 1986 and indicated that it was to be reviewed in November, 1987; furthermore, in their Reply Brief before that court, the Cordreys had acknowledged that throughout this litigation the parties continued to meet regarding Chance's educational program. 917 F.2d at 1468. The Act's implementing regulations require that a child's educational program should be reviewed at least annually. 34 C.F.R. §300.343(a),(d).[11] Petitioners never disputed that all persons required to be present at the IEP meeting were present at the meeting in November, 1987. It must be recognized that the due process hearings began shortly after that meeting. Had there been any dispute as to whether a proper IEP review meeting was convened in November, 1987, that issue could certainly have been raised at that time. It was not. Three years later, during oral argument before the appellate court, is rather late in the proceedings to suddenly object that the record of the due process hearing contains no documentation that the meeting actually occurred. In summary, the court properly found that Chance's IEP had been reviewed as required by the pertinent regulation, and there was no error in this regard. *Cordrey,* 917 F.2d at 1467-1468.

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[11] 34 C.F.R. §300.343 states:

> (a) Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.
>
> . . . .
>
> (d) Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

For their final allegation of procedural violation, Petitioners' claim that Evergreen made decisions in 1984, 1985, and 1986 regarding ESY services for Chance outside of an IEP meeting. In 1986 the parties entered into an Agreement and Mutual Release in which Petitioners agreed to release and discharge Evergreen from any claim whatsoever, including "claims under federal or state laws or regulations relating to the education of the handicapped, from the beginning of time to the date hereof . . . arising from or out of the provision of or withholding of extended school year programming to Chance." (JA. 42-46). The Agreement specifically addressed obligations undertaken by Evergreen for partial reimbursement of Petitioners' costs for providing ESY services in 1984-1986, and established a procedure to determine whether ESY services would be necessary for Chance in 1987. *Id.* Thus, any claims that Evergreen erred in its method for deciding whether to provide ESY services to Chance in 1984-1986 were explicitly released and discharged, and not a proper issue for consideration during these proceedings.[12]

The Cordreys' Petition for this Court's review also references decisions made by the Sixth Circuit on procedural issues in other cases.[13] Petitioners claim that

[12] Moreover, the record demonstrates that the parties discussed the provision of ESY services during an IEP meeting on November 14, 1985. The parties disagreed as to the need for ESY services, and as to whether the County or TAS program, if either, was appropriate for Chance. To avoid litigation at a time when Evergreen was so financially strapped that it was faced with requesting access to state emergency loan monies, Evergreen entered into the Agreement and Mutual Release dated May, 1986 (Tr. 769).

[13] Petitioners cite *Thomas v. Cincinnati Board of Education*, 918 F.2d 618 (6th Cir. 1990) and *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990). These cases do not involve the same facts, nor the same alleged procedural violations as are at issue in the present case. In

(Footnote continued on following page.)

the effect of these decisions together with *Cordrey* "is that parents do not have access to critical pieces and sources of information which the school district is required by law to collect, consider and make available". (Petition, p. 25). Petitioners do not explain how the alleged procedural violations at issue in this matter have impeded Petitioners' access to any information which Evergreen was required to collect, consider or make available. Petitioners do not and cannot claim that any request for Evergreen to provide information was denied. To the contrary, on the one occasion when Petitioners informed Evergreen that Chance's teacher and Dr. Pittner, two potential sources of information, were not present at a conference which Petitioners considered to be an IEP meeting, the record clearly demonstrates that Evergreen promptly offered to reconvene the meeting with those information sources present and available. However, Petitioners explicitly and unreasonably rejected that offer.

Petitioners also claim that the Sixth Circuit's ruling on procedural issues in this matter conflicts with decisions on procedural issues made by the Fourth Circuit. Petitioners specifically cite *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988), and *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985). *Spielberg* involved a school district that unilaterally decided to change a child's placement before conducting an evaluation, and before developing a new

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(Footnote continued from preceding page.)

each case the court was required to review evidentiary rulings in the context of a particular set of facts and circumstances. Allegations of procedural violations call for case-by-case analysis. Petitioners seem to be seeking review of evidentiary decisions in cases to which they were not parties and for which appeal time has run.

IEP to support the change. *Hall* involved a school district which failed to inform parents of their procedural rights, failed to provide special education services after identifying the child as handicapped, and later failed to revise an IEP which was not benefitting the child. 774 F.2d 631. The Fourth Circuit noted that the district's repeated failures to notify parents of their rights under the Act would of themselves constitute adequate grounds for holding that the school had failed to provide the child with a free appropriate public education, but also affirmed the district court's substantive finding that the district had failed to provide the child with an education reasonably calculated to enable him to receive educational benefits.

Clearly, the nature of the procedural errors alleged, and the facts and circumstances at issue in *Spielberg* and *Hall* are distinguishable from *Cordrey*. In addition, the Sixth Circuit determined upon review of the substantive issue that Chance has received the free appropriate public education to which he is entitled.

Moreover, the Fourth Circuit has itself recognized that minor or harmless procedural errors are not a sufficient basis for ignoring substantive issues, and automatically concluding that a child has been denied a free appropriate public education. In *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990), the parents removed a handicapped child from a residential placement, but waited several months, until shortly before the beginning of the school year, to notify the district that they intended to enroll the child in its schools. The district did not notify the parents or develop an IEP within the time periods provided by law. However, the district offered the family an interim placement pending development of the IEP. The family

refused the offer. 895 F.2d at 976. The Fourth Circuit expressly recognized *Rowley's* emphasis on ensuring compliance with the Act's procedures. Nevertheless, the court held that the procedural faults committed by the district in that case had not caused the child to lose any educational opportunity. 895 F.2d at 982. The harmless error was not cause to grant relief to the family.

In summary, contrary to Petitioners' claims, there is no conflict between the circuits on this issue. The courts examine each case on its own facts to determine whether alleged procedural errors occurred, and, if so, whether the child has been harmed. Neither the language or spirit of the Act, nor the prior decisions of this Court preclude such analysis.

In this case, the courts' review of the substantive issue resulted in a ruling that Chance did not require ESY services in order to meaningfully benefit from his special education in 1987. The standard used by the Sixth Circuit to evaluate this issue accords with the standard applied by the other circuits which have had the opportunity to consider provision of ESY services under the Act. The standard takes into account the Act's mandate to provide an appropriate education and this Court's decision that the education provided must confer some meaningful benefit. The standard can continue to be applied at each annual review of Chance's IEP.

The substantive ruling should not be ignored because of alleged procedural violations which have not impaired the parents' right to participate in development of Chance's educational program. The only alleged procedural violation properly before the courts which had the potential to deny full parental participation was easily and immediately correctable. The offer to correct was promptly made and unreasonably refused by Petitioners.

Nothing in the Act, nor in this Court's decisions indicates that any technical procedural missteps by a school district should automatically "transform the administrative review process into an alternative route to obtain an ESY" to which a child is not otherwise entitled. 917 F.2d at 1466.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No 90-1248

In The Supreme Court of the United States

October Term, 1990

CHANCE CORDREY, a minor; and KAREN AND ROBERT CORDREY, on behalf of their minor son,
Petitioners,

—*v.*—

R.J. EUCKERT, Superintendent; GREGG SIMON, MARIANN GLECKLER, CAROL KLECK, RICHARD NAPIERALA, and LOREN PENNINGTON, in their capacities as members of the Evergreen Board of Education; EVERGREEN LOCAL SCHOOL DISTRICT; EVERGREEN BOARD OF EDUCATION,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's evaluation of a handicapped child's need for extended school year services through the use of a strict "regression/recoupment" standard conflicts with this court's decision in *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176 (1982) and Congressional intent under the Education for the Handicapped Act that each handicapped child receive an individualized "free appropriate public education."

2. Whether the Sixth Circuit's application of traditional procedural notions by allocating the burden of proof to the parents and by creating a harmless error exception to a school district's obligation to comply with procedural safeguards of the Education of the Handicapped Act is contrary to this Court's rulings and Congress' remedial intent.

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Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Pursuant to Rule 15.7 of the Rules of the Supreme Court, the petitioners, Karen and Robert Cordrey on behalf of their minor child Chance, submit a supplemental brief in support of their petition for a writ of certiorari. This brief brings to the Court's attention a new case not previously available to petitioners at the time of the filing of the petition. This case squarely fits within and strengthens petitioners' arguments in the first reason for granting the writ.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S USE OF A REGRESSION RECOUPMENT TEST FOR DETERMINING A HANDICAPPED STUDENT'S ENTITLEMENT TO EXTENDED SCHOOL YEAR SERVICES IS (a) UNSUPPORTED BY THE STATUTE, (b) CONFLICTS WITH THE REASONING OF THIS COURT, AND (c) DEMONSTRATES THE CONFUSION AMONG THE CIRCUITS

On December 11, 1990, the U.S. Court of Appeals for the Tenth Circuit decided *Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10th Cir. 1990)[1] and held that the regression-recoupment analysis is not the only measure to determine the necessity for a structured summer educational program. The Sixth Circuit's opinion in this case is in direct conflict with the Tenth Circuit's opinion in *Johnson*.

The court of appeals in this case resolved the issue of the proper standard for determining whether a handicapped child is entitled to extended school year (ESY) services by establishing a strict regression/recoupment test: the parent must establish that the child's educational skills will regress to such a degree over the summer break that the child will not recoup them in a reasonable time. *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir, 1990).

In direct conflict with the Sixth Circuit, the Tenth Circuit in *Johnson* recognized that, while it would be easier for those involved in the administrative process or court review under the Education of the Handicapped Act (20 U.S.C. Section 1415) to have only one criterion for evaluating the appropriateness of the

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1. The *Johnson* opinion was printed in the February 8, 1991 supplement of the Education of the Handicapped Law Reporter, seven days after the petition for certiorari was filed in this case. On February 14, 1991, Petitioners informed Respondents of their intention to file a supplemental brief.

handicapped child's individualized education program (IEP), "the handicapping impediments which force individualization of the child's education program in the first place also mandate an individualized approach to review of the child's IEP." *Id.* at 1027. In explaining its conclusion, the Tenth Circuit quoted the admonishment in *Board of Education v. Rowley*, 458 U.S. 176 (1982) that administrative and court review may not limit analysis of the appropriateness of the IEP to any single criterion. The Tenth Circuit stated: "This restraint is as applicable to a specific education program element, such as whether a child should be provided an [ESY], as it is to a generalized issue such as the 'adequacy of educational benefits . . .'" *Id.* at 1028 (Citations omitted).

The Tenth Circuit enumerates a list of factors, in addition to evidence of past regression, which should have been considered as part of the evaluation of appropriateness of the IEP and the child's entitlement to an ESY. These include: the degree of the child's impairment, the ability of the child's parents to provide educational structure at home, the child's rate of progress, the child's behavior and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested services are extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. *Id.* at 1030, n.9. The court added that this list was not intended to be exhaustive, nor was it intended that each element would impact planning for each child's IEP. *Id.* Furthermore, the court said that an inquiry into these factors was particularly necessary because of the conflict in the evidence concerning the child's past regression.[2] Because the administrative hearing of-

2. As in this case, the evidence in *Johnson* was that the independent experts concluded that the child would regress in the absence of a summer program but employees of the school district concluded the child would not regress.

ficer, state review officer and the lower court focused so completely on only one component of the child's education (i.e. regression/recoupment), the Tenth Circuit concluded that they "erred by converting what should have been a multifactored inquiry into application of a single, inflexible criterion." *Id.* at 1031.

The Tenth Circuit's opinion is consistent with precedents in the Third, Fifth and Eighth Circuits, but the Sixth Circuit's opinion in this case is an anomaly.[3] In support of its conclusion, the Tenth Circuit cites *Battle v. Commonwealth of Penn.*, 629 F.2d 269 (3rd Cir. 1980); *Yaris v. Special School District of St. Louis County*, 558 F.Supp. 545 (E.D. Mo. 1980), *aff'd*, 728 F.2d 1055 (8th Cir. 1984) and; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied* 109 S.Ct. 839 (1989). The Sixth Circuit's opinion in this case is consistent only with its own precedent set in *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D. Ohio 1981) *aff'd*, 720 F.2d 463 (6th Cir. 1983) *cert. denied* 467 U.S. 1201 (1984). In the Sixth Circuit, the regression/recoupment criterion has "stray(ed) too far from its statutory source and (has) take(n) on a life of its own . . ." *Cordrey v. Euckert*, 917 F.2d 1460, 1471 (6th Cir. 1990).

This Court should exercise its authority to: 1) correct the Sixth Circuit's departure from this Court's holding in *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982) and 2) ensure uniformity in an important rule of law.

Accordingly, Petitioners ask that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

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3. In this case, only the Impartial Hearing Officer adopted the five part test of *Lee v. Thompson*, 1982-83 Educ. Handicapped L. Rep. 554:429 (D.H.I. 1988). The State Level Review Officer, District Court and Sixth Circuit applied a strict regression/recoupment test. The five part test of *Lee* is set out in note 11 of Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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